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IN THE

Supreme Court of the United States

A WOMEN'S CHOICE-EAST SIDE WOMEN'S CLINIC, A CLINIC FOR WOMEN, INC., PLANNED PARENTHOOD OF CENTRAL AND SOUTHERN INDIANA, INC., INDIANAPOLIS WOMEN'S FACILITY, FORT WAYNE WOMEN'S HEALTH ORGANIZATION, INC., ULRICH G. KLOPFER, D.O., WOMEN'S PAVILION, INC., and FRIENDSHIP FAMILY PLANNING CLINIC OF INDIANA, on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

SCOTT C. NEWMAN, in his official capacity as a Prosecuting Attorney for Marion County, and GREGORY WILSON, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in upholding Indiana's requirement that a women seeking an abortion obtain certain information *in person* 18 hours in advance of the abortion, rather than by telephone, despite district court findings that providing the information by telephone has no persuasive effect on women in Indiana, and that requiring an in-person visit to obtain such information would prevent approximately ten percent of women seeking abortions from obtaining them?

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Petitioners A Woman's Choice-East Side Women's Clinic, Indianapolis Women's Facility, A Clinic for Women, Inc., Planned Parenthood of Central & Southern Indiana, Inc., Fort Wayne Women's Health Organization, Ulrich G. Klopfer, D.O., Women's Pavilion, Inc, and Friendship Family Planning Clinic of Indiana hereby respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 305 F.3d 684 (7th Cir. 2002), and is reproduced in the appendix to this petition at A-1-62.[2] The opinion of the United States District Court for the Southern District of Indiana is reported at 132 F. Supp. 2d 1150 (S.D. Ind. 2001), and is reproduced at A-63-125. The district court's prior opinions are reported at 904 F. Supp. 1434 (S.D. Ind. 1995) (preliminary injunction opinion), and 980 F. Supp. 962 (S.D. Ind. 1997) (opinion modifying preliminary injunction). These opinions are reproduced at A-126-152 and A-153-236, respectively. In addition, the opinion of the Indiana Supreme Court answering questions certified by the district court is reported at 671 N.E.2d 104 (Ind. 1996).

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[1] MGK, Inc. is the corporation doing business as Women's Pavillion. Plaintiff Indiana Women's Facility is owned by Women's Medical Professional Corporation. None of the Petitioners is a publicly held company or has a parent corporation that is a publicly held company.

[2] The appendix to this Petition is cited as "A-__"; citations to trial exhibits are in the form "Exh. __"; citations to the trial transcript are in the form "Tr.__ (last name of witness)."

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on September 16, 2002. A-1-62. Petitioners filed a timely petition for rehearing and rehearing en banc on September 30, 2002. The petition for rehearing en banc was denied by an equally divided vote on October 28, 2002, and the petition for rehearing by the panel was denied on the same date by a 2-1 vote. A- 237. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Indiana Code section 16-34-2-1.1, the statute at issue in this case, is reproduced in the appendix at A-239-240.

II. U.S. CONST. amend. XIV, § 1 (in relevant part): "Nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

I. This Court's Precedent.

Just over a decade ago, this Court issued its judgment in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *via* the joint opinion of Justices O'Connor, Kennedy and Souter ("the Joint Opinion"). The Joint Opinion announced a new standard of review applicable to the right to abortion, the "undue burden" standard. Applying this newly-minted standard, the Joint Opinion upheld a provision of Pennsylvania law under which, except in a medical emergency, a woman seeking an abortion must be provided with certain information 24 hours prior to the performance of the procedure. *See id.* at 881 (describing 18 Pa. Cons. Stat. § 3205). The plaintiffs in *Casey* challenged this provision

"because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period." *Id.*

The Joint Opinion held that the requirement that specific information be provided to every woman seeking an abortion "may be permissible" if it is "truthful and not misleading," *id.* at 882, even if the information may be "designed to dissuade the woman from having an abortion." *Id.* The Joint Opinion, however, found the mandatory 24-hour waiting period to present "a closer question." *Id.* at 885. The Court considered factual findings made by the district court about the likely impact of the waiting period on women, premised on the assumption that "a woman seeking an abortion [must under the statute] make at least two visits to the doctor," *id.* at 886, one to obtain the required information, and at least one to obtain the procedure. The district court had found that the additional required visit would, for logistical reasons, result in a delay of more than 24 hours for many women; would increase the exposure of women to harassment from anti-abortion protestors, and would be "particularly burdensome" for "women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others . . . ." *Id.* Although the Joint Opinion found these findings "troubling in some respects," *id.*, and although it did not disturb the district court's finding that the waiting period did not promote maternal health, *id.*, it concluded that these findings did not "demonstrate that the waiting period constitutes an undue burden." *Id.*

First, the Joint Opinion reasoned that even though the waiting period did not promote maternal health, it was permissible as a "persuasive measure[] which favor[s] childbirth over abortion." *Id.* Second, the Joint Opinion concluded that though it did not *promote* maternal health, the waiting period did not impose "a real health risk" on women, because it contained an adequate medical emergency exception. *Id.* Third, the Joint Opinion held that the district

court's finding of "particularly burdensome" effects on some women did not "of necessity" amount to a substantial obstacle and hence an undue burden. Thus, the Joint Opinion upheld the waiting period "on the record before us, and in the context of this facial challenge . . . ." *Id.* at 887.

In the intervening ten years since *Casey*, many states have enacted statutes requiring the provision of specific information to women seeking abortions. Most of these statutes alleviate the worst burdens of the waiting period by permitting the required information to be provided to women by telephone rather than in person, thus eliminating the necessity of an additional visit to a physician or other health care provider. *See, e.g.*, ARK. CODE ANN. § 20-16-903(b)(2)(A)(i)-(ii),(B) (2002) (by telephone or in person; by telephone without conducting physical examination or tests); NEB. REV. STAT. § 28-327(1),(2)(d) (2002) (by telephone or in person, without conducting a physical examination or tests, unless patient requests the written material which must be given to her twenty-four hours prior to the abortion or mailed seventy-two hours prior to the abortion); N.D. Op. Att'y Gen. L-115 (1993) (interpreting N.D. CENT. CODE § 14-02.1-02(5)(a),(b) (2001) to permit the description of the state-printed materials to be given by telephone or in person, and the rest of the required information by telephone, in person, or in writing, by mail or facsimile). [3] Only five states

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[3] States also vary the length of the waiting period, *see, e.g.*, ARK. CODE ANN. § 20-16-903(b)(1) (2002) (information must be provided to the woman "prior to and in no event on the same day as the abortion"); IDAHO CODE § 18-609(3) (2002) (requiring that the state materials be provided to the patient at least twenty-four hours before the procedure "if reasonably possible"); KAN. STAT. ANN. § 65-6709 (2001) (mandating twenty-four hour waiting period); S.C. CODE ANN. § 44-41-330(C) (2002) (mandating one-hour waiting period), prescribe the required information with various degrees of specificity, *see, e.g.*, MISS. CODE ANN. § 41-41-33(1)(a)(ii)(iv) (2002) (woman must be told the "particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection,

(Indiana, Louisiana, Mississippi, Utah and Wisconsin) specifically require certain information to be delivered in person to the woman.[4]

The experience of these states in implementing waiting-period statutes similar to the one upheld by the Joint Opinion

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hemorrhage and breast cancer, and the danger to subsequent pregnancies and infertility," as well as the medical risks associated with carrying her child to term); S.C. CODE ANN. § 44-41-330(A)(1)(2) (2002) (woman must be informed only of the probable gestational age of the fetus and her right to review state printed materials); WIS. STAT. § 253.10(3)(c)(1)(f) (2001) (woman must be informed of the "medical risks associated with the particular abortion procedure that would be used, including risks of infection, psychological trauma, hemorrhage, endometriosis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility"), allow health care providers other than physicians to provide the information, *see, e.g.*, ARK. CODE ANN. § 20-16-903(a)(1) (2002) (permitting an agent of the physician to provide the mandatory information); MICH. COMP. LAWS § 333.17015 (2002) as modified by *Northland Family Planning Clinic, Inc. v. Engler*, No. 94-75351, Settlement Stipulation (June 17, 1999) (permitting a "qualified person assisting physician," defined as a licensed psychologist, professional licensed counselor, registered professional nurse, licensed practical nurse or registered social worker, or any agent of the physician "who is 'qualified by education, training, or experience,' to provide mandated information); NEB. REV. STAT. § 28-327(1) (2002) (permitting a licensed physician assistant or registered nurse who is an agent of the physician to give the mandatory information provided he or she has been trained in sexual and reproductive health, abortion and contraceptive technology, short-term counseling skills, community resources and referral, and informed consent); N.D. CENT. CODE § 14-02.1-02(5)(a) (2001) (allowing information to be provided by an agent of the physician); UTAH CODE ANN. § 76-7-305(1)(a)(b) (2002) (permitting a registered nurse, nurse practitioner, advanced practice registered nurse, certified nurse midwife or physician's assistant to deliver the mandatory information; in addition to these individuals, certain specified information can be delivered by a clinical laboratory technologist, psychologist, marriage and family therapist, clinical social worker or certified social worker).

[4] Although partially enjoined, Indiana's law has, since 1997, been implemented in a manner that allows women to receive the mandatory information by telephone rather than in person. A-126.

provides important new evidence beyond what was available to this Court in *Casey*. First, as set forth in more detail below, ***experience with these laws in Indiana, North Dakota and Pennsylvania demonstrates that the information required under these laws does not persuade women to choose childbirth over abortion***. Second, ***experience with these laws in Mississippi and Utah demonstrates that the statutory requirement of an additional in-person visit to obtain statutory information is so burdensome for some women that it prevents approximately ten percent of women from obtaining abortions***. Thus, the district court concluded, based on a record substantially different from the one available to this Court in *Casey*, that Indiana's requirement of an in-person information visit to an abortion provider imposes an "undue burden," and is unconstitutional.

II. The Proceedings Below

In 1995, the Indiana Legislature enacted a new statute governing informed consent for abortion. Prior to its effective date, this case was instituted in the United States District Court for the Southern District of Indiana, challenging the statute on the grounds that it violated the privacy and equal protection rights of those patients of the plaintiffs who desired abortions. Thus, the district court had jurisdiction under 28 U.S.C. § 1331. The district court issued a preliminary injunction against the statute for two reasons: first, based on uncontroverted evidence from experience with a similar law in Mississippi, the district court concluded that implementation of Indiana's requirement of an additional informational visit would prevent at least ten percent of women from obtaining abortions in Indiana. Second, based on its interpretation of the statute's medical emergency exception under Indiana rules of statutory construction, the district court held that the exception was inadequate to protect women's health. Because of the necessity of an adequate medical emergency exception under this Court's

opinion in *Casey*, 505 U.S. at 880, the district court enjoined Indiana's law in its entirety. At the same time, the district court recognized that its construction of the medical emergency definition was necessarily a tentative one, and therefore certified to the Indiana Supreme Court questions regarding the definition. Respondents ["the State"] filed a notice of appeal of the preliminary injunction to the Seventh Circuit, but repeatedly postponed prosecution of the appeal while the Indiana Supreme Court considered the certified questions.

In 1996, the Indiana Supreme Court, in a 3-2 decision, disagreed with the district court's construction of the statute's medical emergency definition and instead adopted a broader construction that obviated any constitutional infirmities. Accordingly, after further briefing, the district court modified its preliminary injunction and allowed the statute's informed consent requirement to take effect, minus the requirement that the information be delivered in person to the woman. The State affirmatively argued that modification of the injunction was required because, *inter alia*, the Indiana Legislature would have intended the statute to be implemented even without the in-person requirement. Thus, in late 1997, women in Indiana began to receive the information mandated by the statute, albeit by telephone in most cases. The State did not appeal from this modified preliminary injunction.

After a trial on the merits was held, the district court made permanent its modified preliminary injunction. Its decision was based on two basic factual findings. First, the district court found that in Mississippi, where a law requiring an additional in-person informational visit was implemented, the law caused a decrease on the order of ten percent in the number of women obtaining abortions. Second, based on evidence from Mississippi, and based on evidence from Indiana showing that the information had no persuasive effect when delivered by telephone, the district court

concluded that the ten percent reduction in the number of abortions could not be ascribed to the persuasive effect of the information. Thus, the district court concluded that if Indiana's requirement of in-person delivery of the information were implemented, that requirement would prevent approximately ten percent of women from obtaining abortions. The district court reasoned that this effect amounted to a substantial obstacle, and therefore an undue burden.

The Seventh Circuit, in a fractured decision, reversed. Each judge on the three-judge panel wrote a separate opinion; two judges (Coffey and Easterbrook, JJ.) opined that the in-person requirement was constitutional, while one judge (Wood, J.) agreed with the district court that the in-person requirement amounted to an undue, and hence unconstitutional, burden on women seeking abortions in Indiana. The court of appeals denied rehearing *en banc* by a 5-5 vote (Posner, Rovner, Evans, Wood and Williams, JJ., would have granted rehearing *en banc*). On November 14, 2002, Judge Easterbrook stayed the Seventh Circuit's mandate pending the filing with this Court of a petition for certiorari, thus leaving in place the district court's injunction against enforcement of the in-person requirement.

A. The Factual Findings of the District Court

Indiana's informed consent statute for abortion requires certain information to be imparted to women seeking abortions at least 18 hours in advance of the procedure. At issue in this case is only whether it is constitutional for Indiana to require that information to be imparted to women *in person* rather than by other means. After a trial on the merits, the district court concluded that this "in person" requirement was unconstitutional because it would reduce by 10-13% the number of abortions performed in Indiana, and because this effect would result from compulsion rather than persuasion. A-112. Specifically, the district court found that

after laws similar to Indiana's were implemented in Mississippi and Utah, the number of abortions in each State dropped by about 10%. A-109. The district court also found that implementation of Indiana's law *without* its "in person" requirement demonstrated that the information provided to women had no persuasive effect, because, if anything, the information appeared to *encourage* women to obtain abortions. A-114-115. In addition, data about women leaving Mississippi to obtain abortions in neighboring states corroborated the lack of persuasive effect. A-115. Thus, the district court inferred that implementation of Indiana's "in person" requirement would cause a decrease in the number of abortions in Indiana on the order of 10% to 13%, and that this decrease would be the result of the coercive effects of the "in person" requirement rather than of the persuasive effects of the information. A-118.

As to the persuasive effect of the information required under Indiana's law, the district court had before it unrebutted evidence that the information required by Indiana's law, when delivered by telephone, *was not persuasive at all, or at best persuaded more women to obtain abortions*. It is, of course, not reasonable to infer that information which has *zero* persuasive effect (or a slight persuasive effect in the direction opposite of that asserted to be the desired effect) will have any significant persuasive effect when delivered in person.[5] Moreover, evidence in the record from Pennsylvania also supported the district court's conclusion that the information is not persuasive, even when delivered in person.[6] *See* Exh. 216, at p. 230 (clinic director

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[5] Thus, even if we assume *arguendo* that "in person" delivery of information in general *doubles* the influential effect of the information, twice zero is still zero. There is simply no plausible mechanism by which delivery of utterly unpersuasive information becomes persuasive (presumably against the abortion choice) when delivered in person.

[6] As Judge Wood points out, the district court's factual inference is further supported by evidence demonstrating that women in Mississippi

in Pennsylvania reported that although "a small percentage of patients change their mind at some point in the preabortion process, . . . that percentage has not changed since implementation of the [informed consent] law").[7] Thus, the district court's inference from the evidence before it was reasonable.[8]

The district court also found that the "results in Mississippi provide a reasonable basis for predicting estimated results in Indiana," concluding "[t]here is no

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left the state after that state's "in person" informed consent statute was implemented and experienced an increase in second-trimester abortions. A-58. Such changes can only be explained by the deterrent effects of the law. This evidence is completely disregarded by the majority opinion. *See* A-59 (Wood, J., dissenting) ("Only by disregarding key points such as the number of women who willingly undertook the burden of seeking an abortion out-of-state, where they could have the entire procedure accomplished in one visit, rather than staying in-state and enduring the two-visit burden, can the majority come to the result it does.").

[7] This clinic in Pennsylvania provided the required information in person. *Id.*

[8] The utter lack of evidence supporting the speculation by the court of appeals that "in person" information will miraculously transform zero persuasion into something detectable is only confirmed by the concurring opinion of Judge Coffey. Judge Coffey resorts to reliance upon an amicus brief to support his belief that providing information in person will be more persuasive, *see* A-36 (Coffey, J. concurring), and to a statement during legislative debates indicating that women seeking abortions "might very well 'want to talk personally to the person who may be performing' the procedure," A-36. But Indiana's "in person" requirement *forces* women to have an additional in-person visit; and absent the "in person" requirement of the law, women are of course free to obtain Indiana's information in person if that is what they "want." Indiana's law, simply put, is not about respecting what women "want," but about imposing a regime on them regardless of what they want. Nor does Judge Coffey's litany of "the almost endless number of physical risks" he believes is involved in an abortion, or his claims that abortion causes suicide and other mental health problems -- none of which is supported by the record in this case -- have anything to do with whether women will be more persuaded by receiving the law's very basic information in person or by other means.

reason on this record to expect the experience to be significantly different." A-110. This finding was based on uncontroverted evidence. Stanley Henshaw, an expert in reproductive epidemiology, testified that the results of his Mississippi study could generally predict the effect of similar laws in other states because certain characteristics, such as cost and attitudes toward abortion, "are fairly uniform throughout the country." Tr. 35. He further testified that Mississippi and Indiana in particular are similar in that both states have low abortion rates compared to the national average and less accessibility to abortion services than other states. Tr. 34-35. Moreover, second trimester abortions are available at only a single facility in Indiana – Wishard Hospital in Indianapolis. Tr. 27 (Culp). Thus, the district court's finding that effects observed in Mississippi are likely to occur in Indiana has ample support in the record.

B. The Seventh Circuit's Holdings

Each judge of the court below authored a separate opinion. Judges Easterbrook and Coffey found Indiana's in-person requirement constitutional and therefore voted to reverse the district court, while Judge Wood in dissent would have affirmed the district court. Judge Coffey explicitly concurred in Judge Easterbrook's opinion on the basis that "Pro-life legislation that *fails to pose a substantial obstacle for 87 to 90 percent of a state's women*, and may have the *incidental* effect of reducing the demand for abortions by merely 10 to percent, is reasonable, sensible, and lawful under the Constitution of the United States and the State of Indiana." A-39 (emphasis added).[9] In other words, a statute that does impose a substantial obstacle for 10 to 13 percent of women seeking abortions is permissible according to the court below so long as it is "pro-life legislation." Judge

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[9] Despite Judge Coffey's sweeping statement, this case has never involved claims under the Indiana Constitution.

Coffey also attacked the district court more generally, accusing it of:

> [D]isregard[ing] controlling legal authority, cast[ing] aside the opinions of qualified medical experts and the judgment of the people of Indiana as represented by the elected members of the Indiana General Assembly . . . . I remain convinced that the trial judge abused his discretion when depriving the sovereign State of Indiana of its lawful right to enforce the statute before us. I can only hope that the number of women in Indiana who may have been harmed by the judge's decision is but few in number.

A-38-39 (Coffey, J., concurring).

Judge Easterbrook engaged in similar but perhaps more opaquely expressed reasoning. First, Judge Easterbrook claimed to find no clear error with any of the district court's findings of fact. A-10. Nevertheless, Judge Easterbrook's opinion replaces virtually every reasonable inference reached by the district court with an alternative, much more speculative inference. The key findings of the district court are (1) that when in-person informational visits began to be required in Mississippi and Utah, the number of abortions in those states fell by about 10%; and (2) that based on the lack of any demonstrable persuasive effect of the required information when provided by telephone in Indiana, as well as on other evidence, this type of effect was due to coercion rather than persuasion. The district court also concluded that a similar effect would likely result in Indiana. Judge Easterbrook, however, indulged in a series of implausible alternative explanations for the findings made by the district court:

> *Maybe* . . . Indiana differs from Mississippi and Utah and will not experience a substantial decline

> [in the number of abortions], with or without multiple visits. Or *maybe* what it shows is that presenting the information in person is critical to its persuasive effect. Our education system rests on the premise that information delivered orally, with an opportunity for give-and-take, "takes" better than information delivered exclusively in writing. . . . So the fact that advice delivered in writing or over the telephone is uninfluential *need not* imply that advice delivered in person will be uninfluential. *[T]he fact that Indiana has been blocked from enforcing its law as written means that the record does not contain evidence needed for an accurate assessment of the statute's effects.*

A-13 (emphases added).[10] *See also* A-16 ("[W]hat transpired in Mississippi need not portend what will happen in Indiana.").

In addition to disputing the inferences made by the district court, Judge Easterbrook also speculated that, if a 10% decline in abortions resulted from full enforcement of Indiana's law, this might be the result of the "possibility that about 10% of all women who have abortions are *on the fence* between ending the pregnancy and carrying the pregnancy to term, so that even a modest cost tips the scales." A-14 (emphasis added). Such modest costs that simply make

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[10] It is worth noting that Indiana's law does not require any "give-and-take" regarding any of the information that must be provided to women. While general principles of informed consent for any medical procedure may require a discussion about the risks, benefits and alternatives to the proposed course of treatment, Indiana's law simply requires the woman to be "informed" of certain data. Further, Judge Easterbrook's intimation that the Act's information was provided to women in *writing* and therefore was rendered less influential is a red herring. The statute (as limited by the district court, A-152) requires the information to be provided "orally," A-239, and there is no evidence that the statute has been violated by any abortion provider.

abortion a less favored option for women "on the fence," Easterbrook writes "would not be an undue burden," *id.*, because they would not constitute a substantial obstacle. In other words, under Judge Easterbrook's reasoning, the State can impose a sort of "sin tax"[11] on the exercise of the right to choose abortion simply to influence the exercise of that right.

Judge Wood dissented. In her view, "the majority disregards the standards that were established by the Supreme Court in [*Casey*], for evaluating laws that impose burdens on a woman's right to seek an abortion, and it brushes aside the painstakingly careful findings of fact the district court made in support of the limited . . . injunction it issued against Indiana's so-called informed consent law, Ind. Code § 16-34-2-1.1." A-39 (Wood, J., dissenting). As she points out, statutes which raise the costs of an abortion may do so in two ways: "an increased cost is unconstitutional if it has the purpose or effect of *forcing* some women to give up their constitutional right to choose abortion; it is constitutional if it genuinely furthers the state's legitimate interest in *persuading* women not to select abortion when faced with an unwanted pregnancy." A- 41. Judge Wood believed that the majority had applied a standard of review so deferential "that a state statute [like Indiana's] would be

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[11] Because the district court correctly found that Indiana's required information has no persuasive effect, the costs imposed by the "in person" requirement serve no purpose other than to deter behavior Indiana finds objectionable. But, as the Chief Judge Posner wrote, "if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle legislators have chosen for expressing their hostility to those rights, the burden is undue." *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (*en banc*) (Posner, C.J., dissenting); *see also Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (recognizing that "a substantial constitutional question would arise if Congress had attempted to [penalize] a woman for exercising her constitutionally protected freedom to terminate her pregnancy," and noting that "a refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity").

unconstitutional only if there was 'no set of circumstances' under which it was valid — by which it seems to mean that not a single woman in Indiana would find the law's burdens tolerable." A-43. Further, she believed that the majority erred by "indulg[ing] the presumption that the law imposes no burden at all . . . [a presumption] found nowhere in our jurisprudence, at least for laws implicating fundamental constitutional rights." A-43.

Turning to the facts established in the record, Judge Wood criticized the majority for rejecting the district court's inference that effects observed in Mississippi and Utah were likely to occur in Indiana as well:

> [The majority] has made assumptions about inter-state differences that are unsupported in this record (and, I suspect, unsupportable). . . . In the field of economics, we assume people will react in similar and predictable ways to incentives. . . . Consistently with that well-accepted proposition, there is every reason here to assume that Indiana women will react to proven incentives and disincentives in the same way women from other states (*e.g.*, Mississippi) have been shown to respond.

A-49-50. And Judge Wood found no plausible way to disturb the district court's finding that the likely effect of Indiana's "in person" requirement would be a result of the undue burdens it places on women. A-59.

REASONS FOR GRANTING THE WRIT

The decision of the court below flouts the undue burden standard adopted by this Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and re-affirmed in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Instead of following this Court's precedents, the court below employed its own standard of review that is completely deferential to the State,

and much less protective of the constitutional rights of women in Indiana. As set forth in more detail below, the Seventh Circuit misapplied *Casey* so severely that the result is a standard not recognizable as one applicable to a constitutional right. Thus, the conflict regarding this important constitutional question is one that should be resolved by this Court, *see* SUP. CT. R. 10(c), so that the women residing in Illinois, Indiana and Wisconsin are not deprived of all meaningful protection for the important constitutional right to choose between abortion and childbirth.

In *Casey*, the joint opinion of Justices O'Connor, Kennedy and Souter adopted a new "undue burden" standard for evaluating the constitutionality of restrictions on abortion. Notably, the Court's judgment did not eliminate the constitutional right to choose abortion, as some of the dissenting Justices in *Casey* would have done. *See* 505 U.S. at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part, joined by White, Scalia & Thomas, JJ.) ("States may regulate abortion procedures in ways rationally related to a legitimate state interest."). Indeed, the only opinion of this Court since *Casey* to directly address the right to abortion states that "the Constitution offers basic protection to the woman's right to choose." *Carhart*, 530 U.S. at 921. *Casey*, in other words, does not establish a toothless standard, but a vigorous one.

First, the undue burden standard clearly continues to permit pre-enforcement challenges to restrictions on abortion. *Casey* itself makes this clear because it holds unconstitutional Pennsylvania's husband notice requirement for abortions, a requirement that had never been enforced. *See* 505 U.S. at 845.

Second, a finding that a statute imposes an undue burden requires a more detailed factual showing than was required under the strict scrutiny standard of *Roe v. Wade*, 410 U.S.

113 (1973). This is so for two reasons: (1) the standard expands the authority of the States to act in furtherance of their "profound interest in potential life," *Casey*, 505 U.S. at 878 (joint opinion), and thus requires district courts to evaluate whether a restriction is designed to, and actually does, further that interest, or the interest in women's health; and (2) even a regulation that does advance one of these interests is invalid "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* Thus, restrictions are invalid under the undue burden standard if a litigant demonstrates as a matter of *fact* that the restrictions either failed to advance one of the two state interests recognized as legitimate in the context of abortion or imposed substantial obstacles upon women seeking abortions.[12] This more fact-based standard necessarily vests in the district courts, as triers of fact, the primary responsibility for assessing whether one of the two recognized state interests is served and whether a restriction will impose a substantial obstacle. *See id.* at 888-91 (relying upon and quoting extensively from district court's "detailed findings of fact regarding the effect of" Pennsylvania's husband notice requirement, which had never been implemented).

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[12] Of course, even before *Casey*, questions of whether restrictions served the state interest in women's health were decided as issues of fact by the federal courts. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. 52, 76-79 (1976) (Missouri's ban on saline and other methods of abortion did not, as a matter of fact, advance state interest in maternal health because it prohibited safer methods of abortion); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 435-37 (1983) (Akron's second-trimester hospitalization requirement did not serve state interest in maternal health because performance of early second-trimester abortions in outpatient clinics was shown to be safe). But prior to *Casey*, courts rarely examined whether the state interest in potential life was furthered as a matter of fact because that interest was only applicable after viability. *See Roe*, 410 U.S. at 164-65.

Third, *Casey* makes clear that if a statute prevents many women from obtaining pre-viability abortions, the statute imposes a "substantial obstacle" and is thus unconstitutional. Thus, this Court wrote that Pennsylvania's husband notice requirement "is . . . *likely* to prevent a *significant number* of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for *many* women, it will impose a substantial obstacle." *Casey*, 505 U.S. at 893-94 (emphases added). No numerical minimum is set regarding how many women must be prevented before an undue burden will be found. In response to the argument by Pennsylvania that fewer than one percent of women would be affected by the husband notice requirement, this Court responded that "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894. But this rejoinder to Pennsylvania's argument could not have meant that a law preventing over ten percent of women seeking abortions in an entire state from obtaining an abortion should be upheld; instead, it shows that even a restriction which affects fewer than one percent of all women seeking abortions in a state may be invalid if it prevents many of the affected women from exercising their constitutional right.

Fourth, *Casey*, as well as subsequent statements by Justices of this Court, suggests that a pre-enforcement challenge to an abortion statute like Indiana's may succeed upon a "better record" than this Court had before it in *Casey* itself. Thus, Justice Scalia, criticizing the undue burden standard, observed that "a better record" might require invalidation of restrictions upheld on the record present in *Casey*. 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.). Justice O'Connor, joined by Justice Souter, later opined that the lower federal courts considering a North Dakota law similar to Pennsylvania's

law "should have undertaken the same analysis" that the Casey joint opinion undertook in examining "the record developed in the district court." *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay). And Justice Souter wrote:

> [T]he references to "this record," [in the joint opinion in *Casey*] combined with our readiness to decide the validity of the challenged provisions under the "undue burden" standard, are plausibly understood as reflecting two conclusions: (1) that litigants are free to challenge similar restrictions in other jurisdictions . . . .

Planned Parenthood v. Casey, 510 U.S. 1309, 1313 (Souter, Circuit Justice 1994) (citing Justice O'Connor's concurrence in *Fargo*). It is almost axiomatic that evidence from the implementation of laws like Pennsylvania would be probative of undue burden.

The decision of the court below conflicts with each of these basic features of *Casey*'s undue burden standard. It forecloses pre-enforcement challenges to abortion statutes not specifically invalidated by this Court. It applies a much lower level of scrutiny to the Indiana statute than this Court applied in *Casey* to Pennsylvania's law by indulging in fanciful and speculative inferences as a means of escaping the reasonable consequences of the district court's careful factual findings. It sets a numerical threshold for the number of women that a state may prevent from obtaining abortions much higher than can be supported by any reasonable reading of *Casey*. And in the course of doing this it eliminates consideration by district courts of the best evidence they could possibly have in assessing whether statutes impose undue burdens: evidence from sister states that have implemented similar restrictions.

I. The Opinion of the Court Below Conflicts With This Court's Opinion in *Casey* Because It Holds that Preventing Ten Percent of Women From Obtaining Abortions Does Not Constitute an Undue Burden.

The opinion of Judge Coffey below holds that abortion legislation that imposes a substantial obstacle on "merely 10 to 13 percent" of women seeking abortions is constitutional. A-39. This holding[13] directly conflicts with *Casey* because it would allow States to prevent hundreds of women each year from obtaining abortions in Indiana, while *Casey* makes clear that an undue burden exists if a restriction "is likely to prevent a significant number of women from obtaining an abortion." *Casey*, 505 U.S. at 893. Ten to 13 percent of all women seeking abortions constitutes a "significant number." Certiorari should therefore be granted to resolve this conflict.[14] *See* SUP. CT. R. 10(c).

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[13] The fact that this holding appears in an opinion nominally entitled a concurrence does not diminish its status as a holding of the court below. Indeed, since Judge Coffey joined Judge Easterbrook's opinion only because he understood this holding to be the "thrust of Judge Easterbrook's reasoning," A-39, it may constitute *the* holding of the court below under *Marks v. United States*, 430 U.S. 188 (1977), since the holding that it is constitutionally permissible to prevent 10 to 13 percent of women seeking abortions from obtaining them is arguably narrower than the complete eradication of the undue burden standard achieved in Judge Easterbrook's opinion.

[14] At the very least, the issue of whether 10 to 13 percent of all women seeking abortions in a state constitutes a "significant number" is an important question of federal constitutional law that should be resolved by this Court. SUP. CT. R. 10(c).

II. The Opinion of the Court Below Conflicts with This Court's Opinion in *Casey* Because It Applies An Improperly Deferential Standard of Review.

Casey did not replace the strict scrutiny standard of *Roe v. Wade* with rational basis review. The court below, while acting under the rubric "undue burden," has instead applied the most deferential version of rational basis review in its examination of Indiana's statute and the evidence of its likely effects. Because the lower federal courts are not authorized to substitute their own preferred constitutional tests for those prescribed by this Court, certiorari should be granted.

A. The Seventh Circuit Improperly Dismisses Evidence From States Other Than Indiana, thus Effectively Foreclosing Pre-enforcement Review of Abortion Statutes.

The court below rejects evidence from Mississippi and Utah showing that requiring an "in person" informational visit prevents women from obtaining an abortion:

> Although *Salerno* does not foreclose all pre-enforcement challenges to abortion laws, it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate. What happened in Mississippi and Utah does not imply that the effects in Indiana are *bound to be* unconstitutional, so Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences.

A-18 (emphasis in original). This holding conflicts with Casey for two reasons. First, the undue burden standard as enunciated by this Court in *Casey* does not require evidence

of what a law's effects are "bound to be";[15] instead, *Casey* struck Pennsylvania's husband notice requirement based on its "likely" effects. 505 U.S. at 893. *Casey*'s determination of the likely effects of mandatory husband notice was based on findings of the district court about domestic violence, sexual assault and other reasons women might have for avoiding notice to their husbands. These findings allowed the district court, as well as the Third Circuit and this Court, to reach the reasonable inference that compelling notification of an abortion to a husband would, in some cases, amount to a substantial obstacle. This Court did not require a finding that the reasonably inferred effects were *inevitable*, only that they were *likely*; likely violation of women's right to privacy suffices under the undue burden standard.

Second, the court of appeals requires that the effects of a statute in pre-enforcement challenges to abortion laws not be "open to debate." But all predictions of future effects are "open to debate," in the strict sense of that phrase. Will women in Indiana respond to the requirement of an additional visit in the same way they did in Mississippi and Utah? Most probably they will -- but one could *debate* the issue by employing far-fetched arguments, such as those employed by the court below: *perhaps* women in Indiana behave differently from women in Mississippi and Utah, even though there is no evidence in the record that this will occur. *See supra* at 11. Yet the holding of this Court in *Casey* is incompatible with this type of reasoning. Of course the effects of Pennsylvania's husband notice requirement were *open to debate* -- and the Commonwealth of Pennsylvania did indeed debate them. But such debates are settled by factual findings of district courts, including inferences drawn from findings. *Anderson v. City of*

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[15] Although the court below does not explicitly elaborate on the meaning of "bound to be," the tenor of its opinion is that only strictly *inevitable* effects of a statute may be considered by a district court in a pre-enforcement challenge.

Bessemer City, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.").

Indeed, what better evidence could a district court have of the likely effects of a statute than evidence demonstrating the effects of similar statutes in other states? If this evidence does not suffice to infer likely effects, then indeed nothing other than the *actual* effects of the statute *in operation* will prove "likely" effects. Moreover, here the district court also had significant *post-enforcement* evidence showing that the information required under Indiana's statute has no persuasive effect, evidence that calls into question the very rationality of the entire statute. *See Casey*, 505 U.S. at 921 (Stevens, J., concurring in part and dissenting in part) ("[A] rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, 'undue' burden."). Rejecting the best possible pre-enforcement evidence of a statute's likely effects conflicts with *Casey*'s acceptance of evidence from national studies and studies in other states as a proper basis for drawing inferences about the likely effects of Pennsylvania's law. And it leaves virtually no room for pre-enforcement challenges to statutes restricting abortion, because one can develop fanciful explanations of how a restriction *might not* have the effects it probably *will* have.[16]

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[16] Thus, under the Seventh Circuit's approach, this Court would have upheld Pennsylvania's husband notice requirement using reasoning such as the following: Maybe husbands, once notified of their wives' planned abortions, will simply cease their abusive behavior because the statute somehow improves family communication. Even if studies did not bear out *this* hypothesis, maybe husbands *in Pennsylvania* will behave differently than they did in nationwide studies or studies in other states.

Further, since *Casey*, many other courts of appeals have upheld pre-enforcement challenges to statutes restricting abortion, necessarily basing their holdings upon reasonable predictions about the likely effects of the statutes. *See, e.g., Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999) (pre-enforcement challenge to ban on certain methods of abortion); *Planned Parenthood v. Lawall*, 180 F.3d 1022 (9th Cir. 1999) (pre-enforcement challenge to parental involvement statute for abortion); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997) (pre-enforcement challenge to parental involvement statute for abortion); *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (pre-enforcement challenge to ban on certain abortions after 20 weeks gestational age). The decision of the court below conflicts with these decisions as well, and this is an additional reason that certiorari should be granted. SUP. CT. R. 10(a).

B. The Seventh Circuit Improperly Replaces the District Court's Reasonable Inferences from the Evidence With Its Own Unreasonable Inferences, thus Undermining the District Court's Role as Finder of Fact in Undue Burden Cases.

A basic feature of the *Casey* undue burden standard is that district courts will be called upon to assess the purpose and effect of statutes affecting abortion. This role of the district courts, however, will be disrupted and negated if, like the court below, courts of appeals are free to replace or discard inferences made by district courts. Of course, the

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Or maybe women "on the fence" about their decision will be not "prevented," but *influenced*, by possible future abuse to decide in favor of childbirth. Or perhaps women confronted with the statute will be motivated by the requirement to leave their abusive husbands.

In other words, one can develop numerous alternative, though highly unlikely, effects of the Pennsylvania husband notice requirement that diminish its burdens. None of these implausible scenarios outweighs reasonable inferences based on facts found by a district court.

"clearly erroneous" standard that applies to district court findings and reasonable inferences from those findings is designed to guard the fact-finding function of district courts in civil cases in general. As the court below has stated in a different context, where a district court factual finding is "within the range of permissible inferences from [the] evidence, [it is not] clearly erroneous." *Harper v. City of Chicago Heights*, 223 F.3d 593, 600 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 883 (2001). Here, the court below has departed from these basic standards governing review of facts in civil cases. The result is a further dilution of the constitutional protection afforded to women's right to choose abortion by *Casey*.

The burden imposed upon litigants by the court below is severe. Instead of confidently relying upon the clearly erroneous standard, litigants challenging abortion statutes must under the Seventh Circuit's holdings go to much greater lengths to prove their case. It will *not* to supply the district court with sufficient evidence that the restriction in question will prevent women from obtaining abortions or that the restriction advances neither of the interests recognized by this Court as justifying abortion restrictions. Instead, litigants must anticipate possible alternative theories of the facts that an appeals court panel may imagine, and refute those theories.

For example, here the court of appeals speculated that perhaps some different effect occurred in Wisconsin (which also requires an additional in-person visit) than in Mississippi or Utah: "What has happened in Pennsylvania, Wisconsin, and the other states whose informed-consent laws require two visits? .... The record is silent on these matters." A-12.[17]

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[17] In fact, data from Wisconsin was not available at the time trial was held; and, in fact, Exhibit 216 contains an analysis of the effects of Pennsylvania's statute, including an important statement by one abortion clinic director that the percentage of women who changed their minds at some point in the pre-abortion process did not change after the statutory

Should Petitioners have anticipated this remark and met it by further evidence? Is it not equally or more reasonable to suppose that if such evidence existed and supported the constitutionality of Indiana's law, the State would have gathered the evidence and presented it to the district court?

The ultimate effect of the Seventh Circuit's abrogation of the *Anderson* standard in this case is to diminish the undue burden standard even further. In a rational basis review case, a litigant expects the Judiciary to indulge all plausible ways in which a statute may serve a legitimate interest. Indeed, this is the heavy burden borne by a litigant challenging a statute not affecting constitutional rights. But it is not the proper approach to district court factual findings in a case involving constitutional rights. The court below, by indulging implausible factual scenarios and insisting upon evidence that does not exist (or ignoring evidence in the record), imposes so high a burden on litigants challenging abortion statutes that a successful challenge is difficult to imagine. *Casey* does not impose such a burden of proof.

In sum, the decision of the court below (1) raises the number of women that a State may with impunity prevent from obtaining abortions to the hundreds; (2) bars the most valid and probative evidence that exists in pre-enforcement challenges to abortion statutes, namely evidence of the effects of similar laws in other states, with the result that such pre-enforcement challenges become nearly impossible to mount; and (3) raises the burden of proof of plaintiffs challenging abortion statutes to virtually unreachable heights, while simultaneously giving no deference to reasonable factual inferences drawn by district courts. The net effect is to replace the heightened scrutiny of *Casey*'s undue burden

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information was provided, thus corroborating the evidence from Indiana that the information has no persuasive effect. So even where evidence is in the record, or the absence of evidence has a good explanation, the court below requires some ineffable additional proof.

standard with a standard of review at least as deferential as rational-basis review. These conflicts between the abortion jurisprudence of this Court and the decision of the court below should be resolved, and certiorari should be granted.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

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Supreme Court, U.S.
FILED

No. 02-935 DEC 16 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

A WOMEN'S CHOICE-EAST SIDE WOMEN'S CLINIC, A CLINIC FOR WOMEN, INC., PLANNED PARENTHOOD OF CENTRAL AND SOUTHERN INDIANA, INC., INDIANAPOLIS WOMEN'S FACILITY, FORT WAYNE WOMEN'S HEALTH ORGANIZATION, INC., ULRICH G. KLOPFER, D.O., WOMEN'S PAVILION, INC., and FRIENDSHIP FAMILY PLANNING CLINIC OF INDIANA, on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

SCOTT C. NEWMAN, in his official capacity as a Prosecuting Attorney for Marion County, and GREGORY WILSON, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the

United States Court of Appeals

For the Seventh Circuit

No. 01-2107

A WOMAN'S CHOICE—EAST SIDE WOMEN'S CLINIC, *et al.*,

Plaintiffs-Appellees,

v.

SCOTT C. NEWMAN, Prosecuting Attorney for Marion County Indiana, on behalf of a class of prosecutors, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 95-C-1148-C-H/G—**David F. Hamilton**, *Judge*.

ARGUED FEBRUARY 19, 2002—

DECIDED SEPTEMBER 16, 2002

Before COFFEY, EASTERBROOK, and DIANE P. WOOD, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. In 1995 Indiana enacted a statute making the woman's informed consent a condition to an abortion. Ind. Code §16-34-2-1.1. Even though the text of this law is materially identical to one held constitutional in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-87 (1992), a federal district court issued a preliminary injunction preventing the statute from taking effect. *A Woman's Choice–East Side Women's Clinic v. Newman*, 904 F. Supp. 1434 (S.D. Ind. 1995). Two years later, the district court modified this injunction to permit the state to enforce most of the law, but it blocked enforcement of the requirement that information be provided "in the presence of the pregnant woman, [by] the physician who is to perform the abortion, the referring physician or a physician assistant" (§16-34-2-1.1(1)). See 980 F. Supp. 962 (1997). After four more years had passed, the judge held a trial and made permanent the injunction as modified in 1997. 132 F. Supp. 2d 1150 (2001).

By requiring information to be supplied "in the presence of the pregnant woman"—rather than by printed brochure, telephone, or web site—the statute obliges the woman to make two trips to the clinic or hospital. This raises the cost (both financial and mental) of an abortion. On the basis of studies concerning similar laws in Mississippi and Utah, the district court concluded that the higher cost will reduce by 10% to 13% the number of abortions performed in Indiana. Some of these women will travel to states that do not require two trips; others will forego an abortion; some who do have an abortion in Indiana will delay that procedure until the second trimester. These consequences show that the law creates an "undue burden" on abortion, the district judge

held. Although by the time the district judge entered the permanent injunction we had concluded that the Mississippi study does not warrant condemnation of Wisconsin's law (which like Pennsylvania's requires two trips to the medical facility and a 24 hour wait), see *Karlin v. Foust*, 188 F.3d 446, 484-88 (7th Cir. 1999), the district judge wrote that data from the Utah study, and a new analysis of the Mississippi data, require a different result. The judge also thought that experience in Indiana showing that the demand for abortion did not decline when information was provided on paper or over the telephone implies that the reduction in the number of abortions is attributable to higher cost (a bad reason) rather than to the statutory information (a valid reason).

Indiana's statute reads as follows:

> An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if the following conditions are met:
>
> > (1) At least eighteen (18) hours before the abortion and in the presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice nurse (as defined in IC 25-23-1-1(b)), or a midwife (as defined in IC 34-18-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:
> >
> > > (A) The name of the physician performing the abortion.

(B) The nature of the proposed procedure or treatment.

(C) The risks of and alternatives to the procedure or treatment.

(D) The probable gestational age of the fetus, including an offer to provide:

(i) a picture or drawing of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus;

at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care from the county office of family and children.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

(3) The pregnant woman certifies in writing, before the abortion is performed, that the

> information required by subdivisions (1) and (2) has been provided.

When the litigation began, plaintiffs challenged not only the requirement that advice be delivered in person but also the medical-emergency exception, which they deemed insufficient because it lacks details found in the Pennsylvania statute. The district court certified the medical emergency issue to the Supreme Court of Indiana, whose interpretation, see *A Woman's Choice–East Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996), satisfied the district judge. See 980 F. Supp. at 966. Plaintiffs then dropped this objection, leaving only the advice requirement as a ground of contention.[1]

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[1] For comparison, we reproduce the substantive portions of the statute at issue in *Casey*, 18 Pa. Cons. Stat. §3205:

> (a) No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:
>
> (1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
>
> (i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
>
> (ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
>
> (iii) The medical risks associated with carrying her child to term.
>
> (2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:

(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

(3) A copy of the printed materials has been provided to the pregnant woman if she chooses to view these materials.

(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

(b) Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

(c) . . . No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

Pennsylvania thus requires essentially the same advice as Indiana, provided "orally" by the physician, 24 hours before the abortion. It is more restrictive than Indiana's law in two ways: Pennsylvania requires a 24-hour waiting period versus 18 in Indiana, and it requires the physician to deliver the information while Indiana allows a range of medical personnel. The defense in subsection (c) of the Pennsylvania statute has no direct parallel in Indiana's law, but the Supreme Court of Indiana has read the "medical emergency" proviso in Indiana's law to achieve the same basic effect. See *A Woman's Choice–East Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996). Neither side contends that any remaining difference between the statutes is material.

Indiana makes much of the fact that its statute has never been allowed to operate as written. It relies on *United States v. Salerno*, 481 U.S. 739, 745 (1987), for the proposition that, except in first amendment cases, a law may be held unconstitutional only when "no set of circumstances exists under which the Act would be valid." Yet in *Stenberg v. Carhart*, 530 U.S. 914 (2000), without so much as a mention of *Salerno*, the Court held invalid, in a pre-enforcement challenge, an abortion statute that might have been construed by the state courts to have at least some proper applications. This leaves us with irreconcilable directives from the Supreme Court. The Justices have insisted that courts lower in the hierarchy apply their precedents unless overruled, even if they seem incompatible with more recent decisions. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). When the Justices themselves disregard rather than overrule a decision—as the majority did in *Stenberg*, and the plurality did in *Casey*—they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books. See also, e.g., *Scheiber v. Dolby Laboratories, Inc.*, 293 F.3d 1014 (7th Cir. 2002) (following *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), even though it is incompatible with the rationale of more recent decisions). *Troxel v. Greenville*, 530 U.S. 57, 85 n.6 (2000), offers us a way out by calling the language in *Salerno* a "suggestion," an approach not essential to *Salerno*'s judgment. Given the incompatibility between *Salerno*'s language and *Stenberg*'s holding, it is the language of *Salerno* that must give way.

Still, to say that a claim is justiciable does not mean that we must ignore the fact that enforcement has not commenced. Plaintiffs rely on predictions about what is

likely to happen if Indiana's law were enforced as written. Because Indiana has been disabled from implementing its law and gathering information about actual effects, any uncertainty about the inferences based on other states' experience and how that experience would carry over to Indiana must be resolved in Indiana's favor. This, coupled with doubts about the role of predictions in constitutional analysis, turns out to be important, for reasons explained presently.

Casey stated, and *Karlin* reiterated, that an informed consent statute may have effects that differ from the written terms, and that those effects could in principle demonstrate that an innocuous-appearing law actually imposes an undue burden on abortion. But neither decision explained how such factual arguments are to be evaluated: before implementation or after?, using what standards? Normally a court asked to say that a statute will have forbidden effects asks only whether a proper outcome is possible; it does not hold a trial—and, if a district judge nonetheless takes evidence and makes findings, the appellate court will reexamine matters with a heavy presumption favoring the law's constitutional application. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124 (7th Cir. 1995). One may say in response that these cases deal with rational-basis review, while abortion implicates fundamental rights. But laws that regulate, not abortion itself, but ancillary issues (such as informed consent), do not affect fundamental rights *unless* the ancillary rule creates an undue burden on the underlying right. How does the court handle factual disputes that bear on *whether* an undue burden has been created? It cannot simply assume that a fundamental right has been burdened; that begs the question.

Stenberg shows that the undue-burden standard must be applied at the level of logic, and to the nation as a whole,

rather than one state at a time. Nebraska forbade use of "intact dilation and extraction" (D&X), a method of late-term abortion. *Stenberg* believed that this ban would have unacceptable consequences because it would induce physicians to steer clear of other procedures similar to the D&X. Nebraska's law therefore was held unconstitutional, as an undue burden on abortion, without the need for a trial. Meanwhile a trial *had* been held in Wisconsin, where the district judge found as a fact that the untoward consequences anticipated in *Stenberg* would not occur. *Planned Parenthood of Wisconsin v. Doyle*, 44 F. Supp. 2d 975 (W.D. Wis. 1999), affirmed under the name *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (en banc), remanded, 530 U.S. 1271 (2000), decision on remand, 249 F.3d 603 (2001) (en banc). The Supreme Court vacated our decision without regard to the district court's findings; it was of the view (as we likewise had concluded, 195 F.3d at 872-73) that constitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands. This worked against the partial-birth-abortion laws in *Stenberg* but has worked in favor of other laws: the Court has held it constitutional to prevent non-physicians from performing abortions, see *Mazurek v. Armstrong*, 520 U.S. 968 (1997), without factual inquiries into whether other medical professionals could do the job as safely, and how much prices may be elevated by a physician-only rule.

Findings based on new evidence could produce a new understanding, and thus a different legal outcome; the plurality implied this in *Casey*, as did we in *Karlin*. But if the issue is one of legislative rather than adjudicative fact, it is unsound to say that, on records very similar in nature, Wisconsin's law could be valid (as we held in *Karlin*) and Indiana's law invalid, just because different district judges

reached different conclusions about the inferences to be drawn from the same body of statistical work. Because the Supreme Court has not made this point explicit, however, and because the undue-burden approach does not prescribe a choice between the legislative-fact and adjudicative-fact approaches, we think it appropriate to review the evidence in this record and the inferences that properly may be drawn at the pre-enforcement stage.

The district court found that the two-visit requirement in Mississippi and Utah reduced the number of abortions performed in those states by about 10% compared with neighboring states that do not require multiple visits. The judge also found that the number of abortions performed in Indiana has not declined because of the advice given to women under Ind. Code §16-34-2-1.1, though not necessarily in person (because that aspect of the statute has been enjoined). Indiana asks us to set aside these findings, but review under Fed. R. Civ. P. 52(a) is highly deferential, see *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and we cannot say that the district court's findings are clearly erroneous. The studies' conclusions were hotly debated on both medical and statistical grounds, but the district judge dealt responsibly with these arguments pro and con, and his findings cannot be upset. But what happened in Mississippi and Utah, a question of historical fact on which appellate review is deferential, does not necessarily ordain what *will* happen in Indiana—or whether what is likely to happen in Indiana amounts to an "undue burden." That admixture of fact and law, sometimes called an issue of "constitutional fact," is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects. Only the findings of historical fact are sheltered by Rule 52(a). Thus our consideration of the studies' *significance* is not deferential. See *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (constitutionality of punitive damages is reviewed

de novo); *Ornelas v. United States*, 517 U.S. 690 (1996) (probable cause for a search or seizure is reviewed *de novo* in the absence of a warrant); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (factual disputes that determine constitutionality under the first amendment are reviewed *de novo*). Cf. *Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002) (without discussing the standard of review, all nine Justices freely substitute their judgment for that of the district and appellate judges on the significance of an empirical study in a constitutional suit). See also Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

By concluding that the empirical work had been carried out competently, the district judge established (for purposes of this litigation) that abortions dropped in Mississippi, compared to those in South Carolina, during the year after Mississippi enacted a statute requiring two visits. The authors of this study (and its replication in Utah) did not ask how Mississippi compares with Indiana. The study does not include a regression based on the sorts of variables, such as urbanization, income, average distance to an abortion clinic, average price of abortion, and so on, that might enable conclusions drawn from Mississippi to be extrapolated with confidence to other states. That is one reason why we held in *Karlin* that the Mississippi study was a poor basis for predicting what would happen in Wisconsin, which we thought more similar to Pennsylvania than to Mississippi. 188 F.3d at 485-86.

That shortcoming could have been fixed in one of two ways. First, the authors could have conducted a more comprehensive study, with additional variables and regression coefficients that would reveal their effects. That was not done. Second, the authors (or other scholars) could have gathered data from other states to test whether (and, if so, how) state-specific characteristics affect the results. That

was not done either. What *has* happened in Pennsylvania, Wisconsin, and the other states whose informed- consent laws require two visits? Did Mississippi prove to be a better predictor of Wisconsin than *Karlin* anticipated, or was the outcome in Wisconsin dissimilar? This record is silent on these matters. Mississippi and Utah, two states with a history of hostility to abortion and very few abortion providers (implying long travel times), may be poor models for other states. Indianapolis has multiple abortion clinics; another in Fort Wayne serves the northeastern portion of the state; women in the northwest and southeast can use not only local providers but also those just across the state lines in Chicago and Louisville. So just as in *Karlin* the application of the Mississippi data (and now Utah's data) to a different state would be a leap of faith. Here is where the pre-enforcement nature of this suit matters.

Plaintiffs did try to deal with another problem identified in *Karlin*: that the original Mississippi study did not try to separate the raw costs of a two-visit requirement from the effects of the information that was provided during the first visit. 188 F.3d at 486-88. The Supreme Court's first two encounters with informed-consent statutes treated these laws as meddling in the physician-patient relation with no valid purpose, and no effect other than to heap pointless costs on women. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 442-49 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759-65 (1986). *Casey* over-ruled both of these decisions and held that states may try to persuade women not to abort their pregnancies. Maybe all the Mississippi study reveals is successful persuasion, we observed in *Karlin*. In this case the plaintiffs tried to separate the effect of information from the effect of making two visits. Since 1997 Indiana has been able to enforce the portion of its informed-consent statute requiring the provision of certain information to women who inquire about abortions. Yet the number of abortions has not

declined. This shows, the district judge wrote, that the law lacks persuasive effect; and if a decline in abortions cannot be attributed to persuasion, then the cause must lie in some other and impermissible feature of the law.

Yet this assumes what is to be proven: that Indiana is like Mississippi and Utah, so that the number of abortions would decline 10% or more if the law were enforced as written. Maybe what Indiana's experience since 1997 shows is that Indiana *differs* from Mississippi and Utah and will not experience a substantial decline, with or without multiple visits. Or maybe what it shows is that presenting the information in person is critical to its persuasive effect. Our education system rests on the premise that information delivered orally, with an opportunity for give-and-take, "takes" better than information delivered exclusively in writing. Otherwise a university would simply mail a syllabus to the freshman class and ask the students to appear four years later for exams. So the fact that advice delivered in writing or over the phone is uninfluential need not imply that advice delivered in person will be uninfluential. Once again the fact that Indiana has been blocked from enforcing its law as written means that the record does not contain evidence needed for accurate assessment of that statute's effects.

Then there is an open question what the 10% reduction reflects. Let us suppose that abortions would decline 10% in Indiana if that state's law were fully enforced. What would the decline signify? One possibility is that many women who strongly want an abortion have been blocked by the cost (in money and time) of multiple visits to the clinic, or because the more times the woman must be absent the greater is the likelihood that an abusive parent, spouse, or partner would discover what the woman has planned and intervene notwithstanding the availability of the emergency bypass, which the Supreme Court of Indiana held to encompass *any* kind of threat to the woman's health or safety. See 671

N.E.2d at 108-09. Another possibility is that about 10% of all women who have abortions are on the fence between ending the pregnancy and carrying the pregnancy to term, so that even a modest cost tips the scales. If the former, then a two visit rule might be deemed an undue burden; if the latter, the two-visit rule would not be an undue burden, for only a law that "has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus" (*Stenberg*, 530 U.S. at 921; emphasis added; quoting from the plurality opinion in *Casey*) is an "undue" burden. This record does not permit (and the district judge did not make) an inference either way about the reason for the decline in Mississippi and Utah. Perhaps this shortcoming could be rectified by studying the effects of changes in out-of-pocket outlays or travel time as prices change, or clinics open, close, or move locations, but the studies in this record do not address the question.

Since 1992, when the plurality in *Casey* announced the "undue burden" standard, only two kinds of statute have flunked the test: a law forbidding the "intact dilation and extraction" (D&X) method of abortion (the subject of *Stenberg*) and a law requiring a woman to notify her husband before obtaining an abortion (discussed in *Casey* itself). Because the language used to describe the D&X also could be understood to prohibit other procedures that were common (and perhaps essential) to late-term abortions, *Stenberg* concluded that the law would forbid abortions altogether for substantial numbers of women. The notification statute did not forbid abortions, but the Court feared that it would come to the same thing for those women whose husbands are likely to respond violently to the notice (if not to any contact from an estranged spouse). The plurality explained:

> The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more

> difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

505 U.S. at 893-94. This record does not suggest that *any* woman in Indiana faces an obstacle of that magnitude in visiting a clinic twice. As we have stressed, Indiana's law has an emergency-bypass clause that has been authoritatively interpreted to cover any kind of physical or psychological risk to the woman. 671 N.E.2d at 108-09. Plaintiffs do not contend that this interpretation falls short of what *Stenberg* and *Casey* require for emergency-bypass opportunities. It is accordingly difficult to see how the sort of outcome that doomed the spousal-notification rule could condemn Indiana's statute.

This is not to say that a two-visit requirement *could not* create a burden comparable to a spousal-notice requirement. Quoting the district court, *Casey*'s plurality assumed that "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.' " 505 U.S. at 886. But it held these considerations insufficient to condemn the Pennsylvania statute. All that the record in the current case shows is that these costs are positive and have *some* effect—something that the plurality in *Casey* assumed. Likewise in *Mazurek* the Court assumed that a statute preventing nurses and other skilled medical personnel whose training falls short of the M.D. from performing abortions would increase the expense (and thus, by the Law of Demand, reduce the number) of abortions; this again was held insufficient to

show invalidity even on the assumption that one legislative purpose was to curtail abortion.

The record in this case does not show that a two-visit rule operates similarly to a spousal-notification rule by facilitating domestic violence or even inviting domestic intimidation. It shows nothing except a decline in the number of abortions in Mississippi and Utah—leaving open both the extent to which other states would experience the same effect and the reason *why* the effect occurs. This is not the sort of evidence that permits an inferior federal court to depart from the holding of *Casey* that an informed-consent law is valid even when compliance entails two visits to the medical provider. If Indiana's emergency-bypass procedure fails to protect Indiana's women from risks of physical or mental harm, it will be a failure *in operation*; it is not possible to predict failure before the whole statute goes into force.

Justice Souter reached a similar conclusion when denying a request to set aside a post-*Casey* decision enforcing Pennsylvania's statute. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309 (1994) (in chambers). Like the third circuit, whose decision, 14 F.3d 848 (1994), he declined to disturb, Justice Souter concluded that *Casey* itself had resolved the facial challenge to Pennsylvania's law. What remained was a challenge to the law in application, on a record showing how that law actually operated in Pennsylvania. 510 U.S. at 1311 & n.3. Just so in Indiana. For reasons we have given, what transpired in Mississippi need not portend what will happen in Indiana.

What is more, it would be incongruous to hold Indiana's informed-consent law invalid on the basis of studies covering Mississippi and Utah that (to the district judge's eyes) imply the *un*-constitutionality of the Mississippi and Utah statutes, while the laws continued to be implemented in Mississippi and Utah. Relying on *Casey*, the fifth circuit has allowed Mississippi to enforce its statute, see *Barnes v. Moore*, 970

F.2d 12 (5th Cir. 1992), and Utah's statute likewise has been sustained. See *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1487, 1494 (D. Utah 1994), appeal dismissed in pertinent part for lack of jurisdiction, 75 F.3d 564 (10th Cir. 1995). No one has asked these courts to hold the Mississippi or Utah statute invalid on the basis of the local experience; and if these laws remain enforceable despite the consequences demonstrated in this record, it is difficult to see why Indiana's law should be unenforceable even though it is unclear whether similar effects would occur there. Indiana is entitled to an opportunity to have its law evaluated in light of experience *in Indiana*. And in the event the sort of effects that could make the burden undue—such as women deterred by the threat or actuality of violence at the hands of those tipped off by a preliminary visit—come to light in Indiana, then it will be informed-consent laws nationwide that must be reevaluated.

For seven years Indiana has been prevented from enforcing a statute materially identical to a law held valid by the Supreme Court in *Casey*, by this court in *Karlin*, and by the fifth circuit in *Barnes*. No court anywhere in the country (other than one district judge in Indiana) has held any similar law invalid in the years since *Casey*. Although *Salerno* does not foreclose all pre-enforcement challenges to abortion laws, it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate. What happened in Mississippi and Utah does not imply that the effects in Indiana are *bound to be* unconstitutional, so Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences.

REVERSED

COFFEY, *Circuit Judge*, concurring.

I.

This case once again requires me to review the constitutionality of informed consent legislation in the context of the abortion industry. Seventeen years ago, I stated that a 24-hour waiting period enacted by the Illinois General Assembly was a reasonable and lawful means of ensuring that a woman has "at least a brief time to discuss and consider" the numerous moral, social, economical, practical, psychological, and medical factors "involved in reaching a mature, well-informed decision of whether or not to abort the pregnancy." *Zbaraz v. Hartigan*, 763 F.2d 1532, 1552 (7th Cir. 1985) (Coffey, J., dissenting). Similarly, I concluded three years later in another case from Illinois that the state is empowered to promote childbirth and discourage abortion on demand by requiring abortionists to advise women about the reasonable alternatives to abortion, just as the state may require physicians to notify their patients about the risks and alternatives to many other invasive medical procedures. *See Ragsdale v. Turnock*, 841 F.2d 1358, 1396-97 (7th Cir. 1988) (Coffey, J., dissenting). Accordingly, for more than a decade, there has been authority for the view that a state legislature may require abortion clinics to provide expectant mothers "with a description of the procedure to be performed, an explanation of risks and possible complications, and a discussion of alternatives so that the woman can make a responsible enlightened choice" prior to terminating the life of her pre-born child. *Id.* at 1397.

In today's opinion, the majority of this panel embraces the dissenting opinions in *Zbaraz* and *Ragsdale*, rejects the abortion clinics' facial challenge, and allows the state of Indiana to enforce its informed consent statute. Although the

dissent criticizes the majority for reversing the district court and "find[ing] flaws with the evidence on which the court based its factual findings"—findings which Judge Wood believes "should stand" regardless of "[w]hether this court is looking at the record *de novo*, under an abuse of discretion standard, or merely for clear error," *post* at 52, 60—I take issue with my colleague's criticism, for the "undue burden standard" applicable in this case may be uniformly applied only if appellate courts independently inquire whether the trial judge's findings of constitutional fact are firmly supported in the record and based upon a proper application of the law. *See, e.g.*, *Memphis Planned Parenthood Inc. v. Sundquist*, 175 F.3d 456 (6th Cir. 1999); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 991 n.6 (1992) (Scalia, J., dissenting).

Judge Easterbrook succinctly and forcefully explains that the trial judge's conclusion in this case involves a "leap of faith" that events which may or may not be occurring in Mississippi and Utah will be *replicated in Indiana*. *Ante* at 12. I add that the trial judge's factual findings in this case are based on a faulty study by biased researchers who operated in a vacuum of speculation. As even the dissent recognizes, the "key" piece of evidence relied upon by the district court was a study published in the August 27, 1997 *Journal of the American Medical Association* ("JAMA"), *post* at 56, and was coauthored by a statistician employed by the Planned Parenthood-affiliated Alan Guttmacher Institute. It is most obvious that the study fails to shed any light on the question before us today: *Will Indiana's abortion statute cause a decline in abortion rates in Indiana? The answer is "no," for the study is riddled with flaws and biases, one of the most serious being its failure to account for the effects that will result from the substantive differences between the scope of the "medical emergency" exception in the state of Mississippi's statute as contrasted with the state of Indiana's statute. Thus, it is logically impossible to draw upon the*

study of Mississippi's legislation when predicting the future effects of Indiana's legislation.

A.

I initially reject the notion that we must defer to the JAMA study because, according to the dissenting judge, the study "*meets any conceivable standard for peer-review*" and was published in "*one of the most highly respected journals in the medical field.*" *Post* at 56. A party proffering expert testimony must always establish that it is reliable and relevant to an understanding of the issue before the court, *Clark v. Takata Corp.*, 190 F.3d 750, 759 n.5 (7th Cir. 1999), and JAMA's peer review policy is no guarantee of reliability. As one commentator has noted, JAMA may send a manuscript out to as many as ten reviewers "but it may actually be reviewed by only three, two, or even one. *Furthermore, an article may appear in print even if a majority of JAMA's reviewers recommends against publication, provided that the editor decides in its favor.*" D. Murray et al., *It Ain't Necessarily So* 151 (2001) (emphasis supplied). Moreover, the test for admissibility is not whether an article has been reviewed, or even well accepted, by one's peers. According to the Supreme Court: "*Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability, and in some instances well-grounded but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published. . . . The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, but not dispositive, consideration in assessing the scientific validity of a particular technique or methodology in which an opinion is premised.*" *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 593-94 (1993) (emphasis added). *See also* L. Noah, *Sanctifying Scientific Peer Review*, 59 U.

Pitt. L. Rev. 677, 698 (1998) ("At best . . . editorial peer review manages to filter out obviously sloppy work.").

Caution regarding the value of "*peer review*" as a judicial gatekeeper is particularly important in the case of *an abortion-related study published in JAMA*. *George D. Lundberg*, the editor at the time of publication of the 1997 study relied upon by the plaintiffs in this case, *has publicly stated that abortion is "a religious issue" which should be decided solely by the woman "after consultation with the father (if possible), members of her family, perhaps a religious adviser, and the woman's physician."* G.D. Lundberg, *JAMA, Abortion and Editorial Responsibility*, 280 JAMA 740, 740 (Aug. 26, 1998). *Lundberg went on to assert that the abortion decision is "not the business of police, lawyers, courts, the U.S. Department of Health and Human Services, the Congress of the United States, various state legislatures, or anybody else except the individuals named above."* *Id.* The executive vice president of the American Medical Association, an organization which at one time was considered to be the voice of the vast majority of physicians and surgeons practicing in this nation, stated that Lundberg was terminated for "*inappropriately and inexcusably interjecting JAMA into a major political debate that has nothing to do with science or medicine*" by choosing to publish a study on how college students defined "*having sex*" in the midst of President Clinton's impeachment proceedings. *See* D. Ballingrud, *AMA Chief Defends Editor's Firing*, St. Petersburg (Fla.) Times, Feb. 23, 1999, at 3B. Relying on these facts, *it is apparent that this JAMA study must be viewed with a jaundiced eye, for it was written by a statistician and published by an editor who are outspoken supporters of "abortion on demand,"*[1] and thus cannot

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[1] Moreover, it is worth noting that more than one JAMA article has exhibited hostility towards informed consent legislation in general. Indeed, a JAMA study published August 14, 2002 concluded that

reasonably be classified as impartial and without prejudice or bias.

B.

Moreover, the faulty JAMA article cannot be utilized to serve as a reliable, trustworthy, and independent basis for predicting the effects of the Indiana legislation for the additional reason that neither the article nor anything else in this record accounted for the fact that a greater number of Indiana women with medical problems (as compared to similarly situated women in Mississippi) will avoid the burdens of Indiana's notice-and-waiting provisions by qualifying for the state's "medical emergency" exception. The trial judge concluded that the number of Indiana women who will find themselves unable to obtain abortions as a result of the notice-and-waiting provisions will be equivalent to the number of women in Mississippi who supposedly are foreclosed from having an abortion—approximately 10 percent of the relevant population. *See* 132 F. Supp. 2d at 1175. However, as is evident from even a cursory reading of the statute, the exceptions to the notice-and-waiting requirements are far more broad in scope and more inclusive in Indiana than they are in Mississippi. As a result, even after attempting to accept the trial judge's notion that properly

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"requiring parental notification for obtaining prescribed contraceptives would impede adolescent girls' use of contraceptive services and their willingness to seek screening and treatment for sexually transmitted diseases." *Girls Surveyed on Sexual-Health Services*, Wall St. J., Aug. 14, 2002, at D2. Many critics declared that the parental notice study had obvious flaws, for the author inexplicably failed to interview a representative sample of the teenage population and *relied instead only upon responses from teenagers who were visiting Planned Parenthood clinics in Wisconsin*. According to one critic, the study showed only that "the types of kids who fool around don't tell their parents about it. That's not surprising." Kawanza L. Griffin, *Girls Would Shun Sex Health Care*, Milw. J. Sentinel, Aug. 14, 2002, at 1A.

performed regression analyses have accounted for all other differences between the female population in Indiana and Mississippi, *id.* at 1163-71, the breadth of the Indiana exception will *obviously result in a greater number of Indiana women being excused from the statute's requirements, and thus a lesser number of Indiana women will be burdened by Indiana's requirements than the requirements in Mississippi.* The Supreme Court of Indiana in its decision broadly defines the term "medical emergency" *as any physical or mental condition that is more severe and prolonged than those "lesser and regular conditions normally associated with pregnancy," A Woman's Choice v. Newman*, 671 N.E.2d 104, 109 (Ind. 1996), while the Mississippi legislature has narrowly defined "*medical emergency*" as "*that condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a twenty-four-hour delay will create grave peril of immediate and irreversible loss of major bodily function.*" Miss. Code Ann. § 41 41-31(b). In Indiana, an abortion clinic may disregard the notice-and-waiting requirements if "*the attending physician, in the exercise of her clinical judgment in light of all factors relevant to a woman's life or health, concludes in good faith that medical complications in her patient's pregnancy indicate the necessity of treatment by therapeutic abortion*" without delay. *Newman, supra* at 111. On the other hand, in Mississippi at the time of the 1997 JAMA study, an abortion clinic was allowed to waive the notice-and-waiting requirement only in "*medical emergencies to avoid the death of the woman or prevent peril of immediate or irreversible loss of major bodily functions.*" *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 656 (Miss. 1998). *See also Utah Women's Clinic Inc. v. Leavitt*, 844 F. Supp. 1482, 1491-93 (D. Utah 1994) (similarly interpreting Utah Code Ann. § 76-7-301(2)). *Cf. Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

As we have pointed out above, because the statutory exception is much more expansive in Indiana than Mississippi, a greater number of Indiana women will be exempt from the limitation of their statute than similarly situated women in Mississippi, and thus I cannot agree that evidence of a 10 percent reduction in Mississippi's abortion rate predicts that a similar reduction is on the horizon in Indiana.

I cannot understand the dissent's attempt to enlarge the scope of Indiana's medical emergency exception by claiming that "*the majority acknowledges [that] Indiana's law has been construed to have an emergency by-pass provision that covers any kind of physical or psychological risk to the woman from any of its provisions, including presumably the 'presence' requirement.*" *Post* at 47, n.2. In doing this, the dissent has *mischaracterized the majority opinion as well as the Indiana Supreme Court's construction of the statute before us*. We in the majority, when stating that Indiana's emergency bypass has been "*held to encompass any kind of threat to the woman's health or safety*," *ante* at 14, are referring to the Indiana Supreme Court's statement that the "*medical emergency exception excuses a woman from the informed consent requirement when there is a significant threat to her life or health, physical and mental*" but that "*severe-but-temporary conditions in which an abortion is not the medically necessary treatment are not covered by the exception.*" *Newman*, 671 N.E.2d at 111. "*Federal courts must interpret a state statute as that state's courts would construe it.*" *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998). In light of *Newman*'s interpretation of the emergency bypass provision, I disagree with the dissent's misinterpretation of the legislature's intent wherein it asserts that the bypass shall apply in situations when the alleged emergency determination is triggered by simple compliance with the 18-hour notice-and waiting provisions, which will in turn expose

the woman to either: (1) a temporarily greater risk of harm from an abusive parent, spouse, or partner; or (2) a temporary period of emotional distress, mental anguish, or trauma. *See Newman, supra* at 108-11.

Furthermore, even if I were to ignore the decision of the Indiana Supreme Court and the many methodological flaws within the JAMA study, it is evident that the very language of the study *disproves* the theory that the effects of Indiana's abortion law will be the same as Mississippi's, for the *study's authors admit on the final page of their study that the burdensome effects of abortion legislation "may be greater in states that have relatively fewer abortion providers" (Mississippi) than in other states (Indiana)*. According to the authors:

> The availability of abortion providers is also important to consider. The effect of mandatory delay statutes necessitating 2 visits to a provider may be greater in states that have relatively few abortion providers. In Mississippi, there were only 8 abortion providers in the entire state in 1992 or 1.3 providers per 100,000 women aged 15 to 44 years . . . . [T]he large decline in abortion rates we observed in Mississippi may not occur in states with greater availability of abortion providers both within the state and among neighboring states.

(Ex. 224 at 658.) The undisputed evidence in this record establishes that: (1) Indiana has eleven more abortion clinics than Mississippi; (2) Indiana women have much easier access to clinics in nearby states than Mississippi women and (3) Indiana women, on average, live closer to abortion clinics than Mississippi women[2]; More than 99 percent of Indiana

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[2] The record establishes that in 1992 there were 19 abortion providers in Indiana, or 1.44 providers per 100,000 women aged 15 to 44 years. (Ex. 221).

women—but only 85 percent of Mississippi women—live within 100 miles of an abortion clinic[3]. (Tr. 67-72). Thus, even if we were to accept the JAMA study at face value, we would be forced to accept the fact that Indiana's law will be far less burdensome than Mississippi's.

Providing neither support nor an analysis for his ruling, the district judge found that "the Mississippi results did not correlate at all with distance or geography" and then somehow concluded that the effects of Indiana's statute "are likely to be equivalent to the effects of the similar law in Mississippi." 132 F. Supp. 2d at 1175. The trial judge's finding is beyond the realm of reasonable speculation and may best be classified as unworthy of credence. Comparing Indiana to Mississippi is like comparing a turnip to a loaf of bread. As the majority observes, neither the Mississippi study nor any other evidence cited by the plaintiffs establishes that the population and demographics of Mississippi and Indiana are similar in terms of "urbanization, income, average distance from an abortion clinic, [or the] average price of abortion." *Ante* at 11. Nor is there evidence of similarity between Mississippi and Indiana in terms of their availability of social support services, attitudes towards abortion, respective success with adoption and abortion alternative programs, or countless other factors that might allow us to equate the two states with any degree of confidence.[4]

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[3] The demographics of Utah also are quite different from Indiana's. More than 95 percent of Utah's abortions are performed in Salt Lake City. Only two abortion providers are located outside of Salt Lake City, and nearly all women living outside of the Salt Lake City area live more than 100 miles from an abortion clinic. (Tr. 70-72).

[4] Mississippi, for example, consistently ranks among the lowest states in the nation in terms of government funding for public schools (48th in 2000). As a result of this lack of funding, products of these schools obviously cannot be as well prepared as their sisters in Indiana to throughly understand and operate the type of electronic maze of

The dissent spends several pages arguing the proposition that "[o]nly by ignoring key points such as the number of women" in Mississippi "who willingly undertook the burden of seeking an abortion out-of-state, where they could have the entire procedure accomplished in one visit, rather than staying in-state and enduring the two visit burden, can the majority come to the result it does." *Post* at 61. The dissenting judge ignores the key fact that nothing in this record answers the critical question of *why* some Mississippi women left the state to abort their pregnancy. A woman might very well think twice about her momentous decision if she believed that her identity were to become known within her local community. On the other hand, we are cognizant of the fact that even a small increase in the cost might dissuade an already vacillating woman living near the poverty level. Since nothing in this record distinguishes "between those incidental effects [*e.g.*, slightly increased cost or time delay] of the statute which make the right to choose more inconvenient or costly and those direct effects which actually prevent women from obtaining an abortion," *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 457 (W.D. Ky. 2000), it is impossible to know whether "the waiting period, as opposed to some other factor or factors, caused the negative abortion trend in Mississippi." *Karlin v. Foust*, 188 F.3d 446, 488 (7th Cir. 1999). It also is impossible to come to a well-reasoned and logical conclusion based on the record before us whether the laws of the state of Indiana will have a similar impact as Mississippi's laws. *See id.*

For the reasons set forth above, it is apparent that the district court's reliance upon the Mississippi data (the Henshaw study) to predict the effects of materially different legislation in Indiana (notice-and-waiting) piles a mountain of speculation upon a foundation of quicksand. I am

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telephonic options (as the district court suggests), particularly when the decision is joined with the life or death decision.

convinced that the district judge erred when he relied on the biased JAMA study when searching for a way to enjoin Indiana's abortion-control statute. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 144-45 (1997) (expert studies based on data that was "*so dissimilar to the facts presented in this litigation*" were irrelevant and inadmissible); *Daubert*, 509 U.S. at 591-92 (expert studies that fail to establish "a valid scientific connection to the pertinent inquiry" before the court are irrelevant and inadmissible).

II.

A.

Even if the plaintiffs had somehow been able to produce reliable evidence in support of the trial judge's belief that Indiana's abortion rates will decline 10 to 13 percent as a result of the state's informed consent laws, Indiana's statute would still pass constitutional scrutiny, for a law enacted that seeks to promote a legitimate state interest will be deemed valid unless, "in *a large fraction* of the cases in which the law is relevant, it will operate as a substantial obstacle to a woman's choice to undergo abortion." *Casey*, 505 U.S. at 895 (emphasis supplied). Accordingly, I write separately to explain my disagreement with the dissent's contention that "we would still be required to enjoin" Indiana's statute even if it blocked a much smaller percentage of Indiana women—" 'only' 1%" of the population—from exercising their "right to choose." *Post* at 46.

In determining whether Indiana's notice-and-waiting provisions are lawful, we must inquire whether women in Indiana seeking abortions, who are unable to qualify for any of the numerous exceptions to the law, will bear added costs and inconveniences from complying with the notice-and-waiting provision that are so burdensome that they will have the direct effect of preventing a "large fraction" of those women from obtaining abortions. *See Casey*, 505 U.S. at

894-95; *Eubanks*, 126 F. Supp. 2d at 456. I am of the opinion that the dissenting judge misinterprets *Casey* when she argues that "*Casey made it clear*" that "*we would still be required to enjoin [Indiana's statute] if it affected 'only' 1%, the number presumptively affected by the spousal notification rule in Pennsylvania.*" *Post* at 53, 46. The *Casey* Court stated that it was enjoining Pennsylvania's spousal notification law because a "large fraction" or a "significant number" *of a subgroup of the one percent of women* who feared complying with the law were "likely to be deterred from procuring an abortion"—not because the law imposed some insubstantial burdens upon one percent of women in the state. *Casey*, 505 U.S. at 894-95.

According to the Court:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. . . . Of course, as we have said [the Pennsylvania statute's] real target . . . is married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that in *a large fraction* of the cases in which [the statute] is relevant, it will operate as *a substantial obstacle* to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

Id. (emphasis supplied). In other words, *Casey* held that Pennsylvania's law was invalid not because it imposed additional burdens upon one percent of the state's women but

rather because it effectively prevented *a "large fraction" of women within that group of one percent of women* from obtaining abortions altogether. *See id.* at 895.

The *Casey* plurality did not explain, and thus we refuse to peer into the dark abyss of speculation in an attempt to determine at precisely what point a fractional part of a group becomes an impermissibly "large fraction" and a statute becomes unduly burdensome. "To the extent I can discern *any* meaningful content in the 'undue burden' standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence." *Id.* at 992 (Scalia, J., dissenting). However, even assuming in the case before us that some number of women will be burdened by the law, it is clear that a law which incidentally prevents "some" women from obtaining abortions passes constitutional muster. Indeed, *Casey* upheld a parental notification law despite the district judge's undisputed finding that, in "some" of the 46 percent of cases where a minor can neither obtain the requisite consent of a parent nor avail herself of the judicial bypass provisions, the law "may act in such a way as to deprive [the minor] of her right to have an abortion." *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1356-57 (E.D. Pa. 1990) (factual findings 237 and 255). Though the requirement was likely to prevent "some" minors from exercising their right to choose, the Court refused to interfere and ruled that "the one-parent consent requirement and judicial bypass procedure are constitutional." *Casey*, 505 U.S. at 899.

The dissenting judge pushes the envelope and expounds a new theory of law without the citation of case law upholding the premise that a statute is unconstitutional if it prevents *even one percent of the relevant population* from obtaining an abortion, *post* at 53, and stretches the notion of substantive due process beyond reasonable limits. Were we to accept the dissent's argument, we believe the Supreme

Court would have found Pennsylvania's parental consent statute to be unduly burdensome. But the Court chose not to strike down the Pennsylvania statute, and I believe it defies logic to argue that one percent of any group is a "large fraction" of that group. In light of the Justices' repeated use of words such as "a significant number of women," and "many women"; its estimate that millions of women would be burdened by a spousal notice law; and the most *informative comments* of Justice Stevens and Justice Scalia that *restrictions are impermissible only if they are "severe," id.* at 920, *and lead to "significant" reductions in abortion rates, id.* at 992, I am of the opinion that the challenged legislation before us is constitutional, even though, as the majority observes, the district court concluded that "the statute. . . raises the cost (both financial and mental) of an abortion," *ante* at 2, and "will reduce by 10% to 13% the number of abortions performed in Indiana." *See Memphis Planned Parenthood*, 175 F.3d at 462-63. *Cf. Okpalobi v. Foster*, 190 F.3d 337, 354 (5th Cir. 1999).

B.

My belief is further supported by *Casey*'s forceful statements distinguishing between the constitutionality of mandatory informed consent laws (which are lawful) and mandatory spousal notification laws (which are not). Although under *Casey*, states may not enact spousal notification laws embodying views that are "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution,"[5] *Casey*, 505 U.S. at 898,

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5 Although the *Casey* plurality dismissed the father's interests in the life of his unborn child, it is important to note that the four dissenting Justices were of the opinion that the state "has legitimate interests both in protecting the interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests." *Casey*, 505 U.S. at 974 (Rehnquist, C.J., dissenting in relevant part). "By providing that a husband will usually

"it does not at all follow that the State is prohibited from taking steps to ensure that [the choice to end a pregnancy] is thoughtful and informed." *Id.* at 872. It is incumbent upon the federal judiciary to respect basic principles of federalism and give considerable deference to a state legislature's carefully reasoned decision to "enact rules and regulations designed to encourage [the woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself." *Id.*

This record reflects that the Indiana General Assembly held a full panoply of hearings, engaged in extended floor debates, and considered numerous amendments offered by legislators prior to enacting the informed consent law before us today. Absent a clear constitutional violation, neither a federal district court nor an appellate court should ever take it upon itself to strike down legislation merely because it disagrees with the legislation enacted by democratically elected state representatives. Informed consent laws, having notice-and-waiting periods like Indiana's, should thus be upheld, for the Supreme Court has held that the "idea that important decisions will be more informed and deliberate *if they follow some period of reflection does not strike us as unreasonable*, particularly where the statute directs that important information become part of the background of the decision" *concerning the life or death of the child. Casey*, 505 U.S. at 885 (emphasis supplied). *See also Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976).

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know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him." *Id.*

The Indiana General Assembly enacted its notice-and-waiting statute in an effort to alleviate a widespread problem. Witnesses at legislative hearings reported that literally hundreds of Indiana women were suffering serious regret and long-term physical, emotional, and psychological damage as a result of their choice to terminate their pregnancies without being properly informed about the risks, complications, and alternatives to the procedure. *A Woman's Choice v. Newman*, 904 F. Supp. 1434, 1449 (S.D. Ind. 1995).[6] The intent of the legislature, according to the Supreme Court of Indiana, was to reduce the risk of abortion by "ensur[ing] that women receive the best information available" regarding the moral, social, psychological, and medical issues relevant to deciding whether to undergo the procedure. *Newman*, 671 N.E.2d at 111.

Included in the information that must be provided to the patient is: (1) the name of the abortionist; (2) the nature of the proposed procedure; (3) the risks and alternatives to the procedure; (4) the probable gestational age of the fetus; (4) the existence of medical assistance benefits and abortion alternatives; and (5) the father's legal responsibility to assist in the support of the child if the child is carried to term. Ind. Code §16-34-2-1.1. I am convinced that the Indiana General Assembly has made a reasonable and lawful decision when enacting this informed consent bill in an effort to ensure that the woman's choice regarding the life or death of her child

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6 The risk of suicide for women who have abortions is both serious and real, if often under reported. *See* B. Garfinkel et al., *Stress, Depression and Suicide: A Study of Adolescents in Minnesota* (1986) (finding that a teenage girl in Minnesota was ten times more likely to attempt suicide if she had undergone an abortion in the previous six months than a comparable girl who had not had an abortion); *Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study*, 313 British Med. J. 1431-34 (Dec. 7, 1996) (concluding that Finnish women who had induced abortions had a suicide risk *three* times that of the general population and *six* times that of women who gave birth).

has been both knowingly and voluntarily made, after extended debate and careful reflection.

This legislation will assist women in understanding that abortion is an invasive procedure that may very well have painful psychological, physical, and moral consequences. The woman undergoing the abortion may very well experience serious psychological disorders and mental health problems in the form of depressive psychosis (including the risk of suicide) both before, during, and for many years following her decision—perhaps even for a lifetime. Added to this mental strain and anguish are the almost endless number of physical risks involved, including trauma, permanent damage to reproductive and other vital organs, dysfunction of the cardiovascular or respiratory system, internal bleeding or hemorrhaging, embolism, and allergic reactions. Other medical factors to be considered in making a mature, informed decision include the type of abortion to be performed, the woman's past medical and psychological history, her physical reaction to previous medical procedures, her tolerance for certain medications, the likelihood of contracting a uterine infection, the chance that the placenta and fetus will not be completely removed, the potential for future difficulties in bearing children, and even the possibility of sexual sterility. *See Zbaraz*, 763 F.2d at 1549-50 (Coffey, J., dissenting).

The Indiana statute requires that the name of the abortionist be made known to the patient, thus giving her an opportunity to review the credentials, qualifications, and experience of the physician, inquiring into whether he is a board-certified gynecologist, is accurate in his pregnancy term diagnosis, and is familiar with both the procedure and the myriad complications that may very well arise during the procedure. *See id.* at 1550. In making this decision, she is entitled to know whether the abortion procedure is being performed by "a well-trained, qualified surgeon or simply a

second-rate surgeon who entered the abortion practice because he was denied hospital staff privileges by a medical peer review committee after questionable medical procedures or inferior surgical technique." *Id.* at 1552. Such information is essential to making a responsible decision.

The woman also will receive information regarding economic issues, such as the father's obligation to contribute to the support of the child, the availability of medical benefits and child care, and the right and possibility of giving up the baby to a loving adoptive family. After receiving such information, it also is probable that the best interests of the client would be better served were she to be granted a reasonable period of time to reflect upon the information recently made known to her dealing with the possible social and psychological problems arising from the decision. Hopefully, the medical professionals who meet with the woman will be well-trained in order that they might prepare the patient to confront and resolve the possible feelings of anger, fear, depression, and confusion she may encounter towards herself and/or the father, the onset of guilt and overall withdrawal from society, and the all too frequent threat of the taking of one's own life. *See id.* at 1550; *ante* at 34, n.6.

It also is reasonable for a state legislature to have believed that the most efficient way to safeguard the health, safety, and well-being of the pregnant woman would be to allow her to receive the above-stated information during a face-to-face meeting with medical professionals. It was most unfortunate and inappropriate for the court to accept the proposition that voluntary consent for an abortion may be insured by a patient dialing an 800-phone number, touching certain digits on her keypad, and then passively taking in information through the telephone. *See* 904 F. Supp. at 1452.

Only a direct, face-to-face meeting will serve to allow the patient and the doctor to have a full and complete

understanding of the possible problems that might arise during or after the invasive procedure. This—and only this—type of meeting is the way to determine whether the client is giving an informed consent or is conveying a wish to postpone the procedure. Personal contact is vital to any question of informed consent, for it allows the medical expert the best opportunity to observe the verbal and nonverbal behavior of the patient by focusing on her reactions and responses to questions, her facial expressions, attitude, tone of voice, eye contact, posture and body movements, confused or nervous speech patterns and countless other factors that are indiscernible by telephone but may reveal incongruities between what the patient says and what she actually feels or believes. *Cf. United States v. French*, 291 F.3d 945, 951 (7th Cir. 2002); *United States v. Mancillas*, 183 F.3d 682, 701 n.22 (7th Cir. 1999).

As a result, a face-to-face consultation occurring a reasonable time before the abortion "may disclose what a telephone interview will mask: whether a woman is apprehensive, uncertain, or equivocal about whether to have an abortion; whether she needs or wishes some additional information; or whether she wishes, but may find it difficult, to ask some additional question or explore some other alternative."[7]

In the Indiana House of Representatives, the chief sponsor of this bill stated during extensive debates that it is important for women to receive this information *either in the presence of the abortionist or a well-schooled and -trained physician's assistant, licensed practice nurse, or midwife* because the patient might very well "want to talk personally to the person who may be performing" the procedure and

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[7] Brief *Amicus Curiae* of the United States Conference of Catholic Bishops and the Indiana Catholic Conference at 7-8 (internal citations and ellipsis omitted).

would benefit from personal, face-to-face consultation instead of meeting the professional for the first time "on the operating table" and it is unclear whether "this is the doctor or the person you're supposed to be talking to." *Newman*, 904 F. Supp. at 1464-65.

Indeed, the need for an in-the-presence requirement was underscored by testimony at the preliminary injunction hearing, where a woman who had just recently undergone the procedure at an Indiana abortion clinic testified she never saw her doctor until he began the procedure, never saw his face (for it was covered with a surgical mask), and never learned his name because he never spoke with her. The woman testified as follows: *"[A female assisting nurse] said, " 'This is your doctor,' and I said, 'Does my doctor have a name?' And he giggled and she smiled, but I don't know who he was. And he did the procedure. He never talked to me. He talked to her. They talked about something, I can't even remember, and it was over. And he left.*" (Tr. 416-17).

Some of the materials that the General Assembly directed the abortionist to provide to the woman, in order that she might be properly informed before making one of the most important decisions of her entire life and to minimize as best as possible the potential for future physical or psychological injuries, cannot be accurately or easily conveyed through other media, as the district judge's injunction requires. The General Assembly was of the opinion that it is essential for the woman to be well-informed among other things, of the "probable gestational age of the fetus" and also be given the option of seeing a picture or drawing of the fetus and its dimensions. Ind. Code § 16-34-2-1.1(1). It is nigh unto impossible to provide a picture or drawing of a pre-born child over the telephone unless both the patient and the abortion clinic are equipped with expensive, highly advanced videoconferencing equipment. Furthermore, any attempt to provide an illustration through the mail without having first

met with the patient for a physical examination may potentially be misleading and inaccurate. The district judge's refusal to enforce Indiana's requirement of face-to-face meetings between the health care provider and the pregnant woman emasculates the statute and undermines the very intent of the legislature.

In my opinion, it was an abuse of discretion for the district judge to disregard controlling legal authority, cast aside the opinions of qualified medical experts and the judgment of the people of Indiana as represented by the elected members of the Indiana General Assembly, and declare that the "in the presence" requirement is not "reasonably likely to provide any genuine benefit" to Indiana women. *Newman*, 904 F. Supp. at 1465. Not many judges are versed in the nuances of the practices and techniques of the medical profession. Thus, the judiciary is "ill-equipped to substitute [its] views regarding what is medically adequate, proper, or antiseptic" for those of the legislature, which acts with the full benefit of evidence received through hearings, debates, and meetings with the people of the state. *Ragsdale*, 841 F.2d at 1389 (Coffey, J., dissenting).

The trial judge's questionably reasoned *ipse dixit*, pronounced without the support of even one citation to the record, invades the legitimate province of the legislative and executive branches and places a straitjacket upon their power to regulate and control abortion practice. As a result, literally thousands of Indiana women have undergone abortions since 1995 without having had the benefit of receiving the necessary information to ensure that their momentous choice is premised upon the wealth of information available to make a well-informed and educated life-or-death decision. I remain convinced that the trial judge abused his discretion when depriving the sovereign State of Indiana of its lawful right to enforce the statute before us. I can only hope that the number

of women in Indiana who may have been harmed by the judge's decision is but few in number.

III.

In Indiana, according to the preamble to its abortion control statute, "*[c]hild birth is preferred, encouraged, and accepted over abortion.*" Ind. Code § 16-34-1-1. Furthermore, "in America, we respect the sanctity of human life." *Walsh v. Mellas*, 837 F.2d 789, 798 (7th Cir. 1988). Pro-life legislation that fails to pose a substantial obstacle for 87 to 90 percent of a state's women, and may have the incidental effect of reducing the demand for abortions by merely 10 to 13 percent, is reasonable, sensible, and lawful under the Constitution of the United States and the State of Indiana. Because this is the thrust of Judge Easterbrook's reasoning, I am pleased to join his opinion.

DIANE P. WOOD, *Circuit Judge*, dissenting. In today's opinion, the majority disregards the standards that were established by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for evaluating laws that impose burdens on a woman's right to seek an abortion, and it brushes aside the painstakingly careful findings of fact the district court made in support of the limited preliminary injunction it issued against Indiana's so-called informed consent law, Ind. Code § 16-34-2-1.1. The careful reader of the majority's opinion will see that the majority regrets the fact that the Supreme Court held in *Stenberg v. Carhart*, 530 U.S. 914 (2000), that pre-enforcement challenges of abortion statutes, like the one presently before us, are permissible. Nevertheless, *Stenberg*

is the law of the land and we must follow its direction, including its endorsement of the constitutional standards governing abortion legislation first articulated by the *Casey* plurality. See *Stenberg*, 530 U.S. at 921. That direction is by no means the opaque mess the majority accuses the Supreme Court of creating. In my view, the Court has not left us with "irreconcilable directives" nor has it put courts of appeals "in a pickle." *Ante* at 7. At the most, if we were reviewing legislation in some field unrelated to abortion (or speech), we might be faced with the problems the majority describes. As for abortion regulation, the Court's guidance is crystal clear. In the end, the majority concedes that *Stenberg* governs, which ought to be enough for present purposes to lead to an affirmance of the district court's grant of the injunction.

When one follows the analytical path outlined in *Casey*, it becomes clear that the district court did not abuse its discretion when it concluded that one narrow requirement of Indiana's law had to be enjoined. In support of that conclusion, the court found that in the particular circumstances faced by Indiana women, and on the basis of the expanded factual record that the Supreme Court invited in *Casey*, the law's requirement that women receive certain advice "in the presence" of "the physician who is to perform the abortion, the referring physician or a physician assistant" (§ 16-34-2-1.1(1)) amounts to an unconstitutional "undue burden" on the abortion decision. I would affirm the district court's decision.

Before turning to the areas of disagreement that lie between the majority and me, it is important to point out that we also share some areas of agreement. First, it is clear that Indiana's requirement to furnish the statutory information "in the presence of the pregnant woman" (instead of, for example, mailing written materials, having a telephone conversation, or visiting a local doctor who is neither the referring physician nor the physician who will perform the

procedure) is one that raises the cost of obtaining an abortion. This is because the "presence" rule normally necessitates two trips to the abortion facility.

Second, the majority notes, and I agree, that there are both unconstitutional ways in which costs may be raised and constitutional ones: an increased cost is unconstitutional if it is has the purpose or effect of *forcing* some women to give up their constitutional right to choose abortion; it is constitutional if it genuinely furthers the state's legitimate interest in *persuading* women not to select abortion when faced with an unwanted pregnancy.

Third, I agree with the majority that the standard of review for constitutional or legislative facts is more searching than the one we use for historical facts. That does not mean, however, that we may disregard the district court's findings of historical fact. To the contrary, the Supreme Court has emphasized that we owe deference to such findings even in constitutional cases. See *Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"). Were we to abandon that rule, many constitutional matters would receive far less restrained review than we presently give them: from possible violations of the Fourth Amendment, to the voluntariness of confessions, to the First Amendment protection accorded to public employee speech.

I

Turning now to the way in which we should resolve this appeal, it is useful to begin with some reminders about what *Casey* held. (For ease of exposition, I refer to *Casey* alone rather than to "the *Casey* standard as endorsed in *Stenberg*," since the latter formulation, while more accurate, is

needlessly cumbersome.) First, *Casey* dictates how to draw the line between permissible state regulation and unconstitutional regulation:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

505 U.S. at 874. The opinion later elaborates on the undue burden standard:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. at 877.

Applying this standard, the Court struck down the Pennsylvania statute's spousal consent requirement and the record-keeping requirement relating to spousal notice; it upheld the statute's parental consent requirement (which contained the necessary one-parent and judicial bypass

provisions), the medical emergency provisions, the rest of the record-keeping requirements, and the "informed consent" requirement. Knowing both what failed the new test and what passed it gives litigants a roadmap of the kind of claims that are likely to succeed, and the kind of evidence they must present. It also gives us concrete guidance on the critical questions now before us: (1) under the *Casey* test, must the statute create an "undue burden" for every single woman, or is it enough that it create an undue burden for some women; (2) to what extent are we dealing with empirical, fact-specific issues, and to what extent with "legislative" issues; and (3) how must the statute allow for flexible compliance with the state's broader goals?

The first question—how many women must be affected— is really another way of putting the question about facial challenges that the majority addresses. *Ante* at 7. In this connection, despite its disclaimers, one is left with the strong impression that the majority is applying either *United States v. Salerno*, 481 U.S. 739 (1987), or something very close to it. In essence, it holds that a state statute like the one before us now would be unconstitutional only if there was "no set of circumstances" under which it was valid—by which it seems to mean that not a single woman in Indiana would find the law's burdens tolerable. This is an impermissible back-door application of *Salerno*. Worse yet, it assumes the answer to the question before us: whether the system Indiana wants to put in place will unduly burden Indiana women. Since the pertinent part of the statute has never gone into force, the majority indulges in the presumption that the law imposes no burden at all. But this presumption is found nowhere in our jurisprudence, at least for laws implicating fundamental constitutional rights. Furthermore, this methodology is inconsistent with *Casey*.

Part V–C of *Casey* addressed the spousal notification requirement of the Pennsylvania law, also under

circumstances in which enforcement had not yet begun. The district court had found, and the Supreme Court accepted, that "[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnancy. . . ." 505 U.S. at 888. We can assume, therefore, that the spousal notification requirement was not an undue burden, or any kind of burden, for that "vast majority" of women; they are already doing what the statute specified. But the Court went on to consider the plight of women who were not already consulting the putative father: the 2,000,000 women a year who are the victims of severe assaults by their male partners. As for *those* women—"the victims of regular physical and psychological abuse at the hands of their husbands," *id.* at 893, matters were different. The Court found, based on "[t]he limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative," *id.* at 892, that the spousal notification requirement was "likely to prevent a significant number of women from obtaining an abortion." *Id.* at 893. Later, to underscore the point, it reiterated that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." *Id.* at 894.

That takes us to the second critical question: whether the reduction in abortions performed is the result of the law's persuasive force or the consequence of the impermissible placement of obstacles in the path of a woman's right to choose. One may assume, for the sake of argument, that fewer women in Indiana will forego an abortion than did women in Mississippi, according to the studies in the record. One may further assume that a larger percentage of women in Indiana who forego an abortion will do so because they were persuaded by the law's informational requirements, contrary to their sisters in Mississippi. No matter: under *Casey*, our focus must be on those women who, like those affected by the spousal notification requirement in Pennsylvania, will

forego the abortion because of the burden, and not because of persuasion.[1]

I cannot imagine a more resounding repudiation of the *Salerno* approach than the *Casey* opinion gave. The majority opinion in *Stenberg* makes it clear that this was no accident or oversight. We must therefore look at the effect of the "in the presence" requirements on the Indiana women upon whom the statute operates: the approximately 10% (as the record suggests and as the district court found) who will no longer be able to obtain abortions under the new regime. (Note that the 10% number could be off by an order of magnitude and we would still be required to enjoin this part of the law if it affected "only" 1%, the number presumptively affected by the spousal notification rule in Pennsylvania.)

But, the majority responds, the Supreme Court in *Casey* upheld something almost exactly like the Indiana "in the presence" requirement when it found that Pennsylvania's informed consent rules passed muster. Informed consent at the most general level, of course, was not the issue either in our case or in *Casey*; under the injunction the district court entered, every Indiana woman is furnished with the information the state deems helpful, and when she shows up for the abortion procedure the doctor can once again assure

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[1] In fact, the parallel with the spousal notification requirement in *Casey* runs deeper than the mere finding of an undue burden. Were the Supreme Court to have reasoned along the same lines as the majority of the panel, it would have concluded that the 1% of women who forego abortions because of the notification requirement have in fact merely changed their minds—been "persuaded"—after the consultation with their husbands that would not have occurred but for the notification requirement. The Court focused on those women who were *not* persuaded, but who instead were forced to carry their pregnancy to term because of the risk of violence or abuse from their male partner. Similarly, this court should focus on those who are not persuaded because of the "presence" requirement, but for whom this requirement is close to the equivalent of a flat prohibition on abortion.

herself that the patient's consent is informed. Our concern is with the specific way in which the state wants the information to be transmitted.[2]

The majority suggests that *Casey* has already answered this question, insofar as it addressed a regulatory regime with a similar "two visit" rule. But a look at the *Casey* opinion shows that the Court was not writing so broadly; to the contrary, the Court took great pains *not* to rule on informed consent/two-visit rules either in general as a matter of fact or as a matter of law. Instead, it explicitly limited its holding to the record before it. It stated that there was "no evidence *on this record* that requiring a doctor to give the information as provided by the statute would amount *in practical terms* to a substantial obstacle to a woman seeking an abortion." *Id.* (emphasis added). There is no reason to treat the phrases "on this record" and "in practical terms" as casual insertions. The Court thought that the waiting period question was a close one, particularly because it would often translate into a two-visit requirement. The Pennsylvania district court had not made the necessary findings of fact to show that a two-visit requirement would amount to an undue burden (largely

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[2] As the majority acknowledges, Indiana's law has been construed to have an emergency by-pass provision that covers any kind of physical or psychological risk to the woman from any of its provisions, including presumably the "presence" requirement. But that does not distinguish it from Pennsylvania's statute, which also relieved a physician of compliance with the informed consent rules "if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." 18 Pa. Cons. Stat. § 3205(c) (1990). The existence of such a statute was not enough to convince the Court that the spousal consent requirement was permissible. By the same token, the existence of a similar safety valve in the Indiana statute is not enough to save the otherwise burdensome "presence" requirement, for the reasons I explain below.

because that court had applied the old trimester test from *Roe v. Wade*, 410 U.S. 113 (1973), and had invalidated the rule for other, less factually sensitive, reasons). If there could be any doubt remaining on the question whether the Court was restricting its ruling to the record before it, the following passage from *Casey* should set it to rest:

> And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

505 U.S. at 887.

Casey, therefore, establishes the following guidelines for the present case: (1) we must evaluate the Indiana law based on those upon whom it is operating, which is to say the set of women who will be burdened by the "in the presence" requirement; (2) if there were no evidence before the court tending to show that this requirement, like the spousal notification rule considered in *Casey*, is "likely to prevent a significant number of women from obtaining an abortion," 505 U.S. at 893, then we would be required to uphold Indiana's rule on this facial challenge; but (3) since there is evidence that is at least as reliable—if not much more so—than the evidence on which the *Casey* opinion relied in evaluating the spousal notification rules, we must look at what that evidence shows, deferring to the district court's findings of historical fact, just as the Supreme Court did in *Casey*. *Cf. Ornelas*, 517 U.S. at 699. I now turn to the evidence before the district court.

II

Initially, it is necessary briefly to consider what we mean by the term "fact" and how a fact may be established. The

majority has tried to explain how and why it is reversing the district court, even while it accepts such critical findings of fact as (1) abortions dropped in Mississippi after enactment of a two-visit rule, as compared to those in South Carolina, which did not have a two-visit rule; and (2) the number of abortions performed in Indiana has not declined because of the advice given to women pursuant to the statute. Even though these facts support the district court's finding, the majority argues that the ultimate finding of an "undue burden" cannot be sustained, largely because the Supreme Court did not find such a burden in *Casey* for a similar rule, nor did this court in *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999), the decision upon which the majority places most of its reliance. With respect, I believe this approach confuses two fundamentally different inquiries: the first concerns the way in which a certain fact must be established, and the second asks whether this fact will logically vary from case to case or if, once properly established, it is "legislative" in nature such that it cannot be questioned over and over again.

Casey, as the preceding discussion makes clear, was focused on the first of those questions. The Court there decided that the existence of an "undue burden" had not been established on the record then before it. It left the door open, however, for later parties to present more evidence that would cure the gaps in the record that existed. This point can be illustrated by an analogy to new drug approval. Suppose a pharmaceutical company approaches the Food and Drug Administration with an application for approval of a new drug, Alpha. Naturally, it submits supporting information to the agency. If, however, the FDA deems that information insufficient, it will reject the application. This does not mean that the company cannot re-apply later, after it conducts more clinical studies or otherwise cures the deficiencies in the earlier record. Based on a fully supported application, the FDA will decide whether Alpha should be approved as safe and effective for the designated uses. Our situation is exactly

the same. We now have in this case the "re-application" for a finding whether a rule that requires two visits to the clinic (here, Indiana's "presence" requirement) constitutes an undue burden. Are there, in other words, women for whom this rule has the "effect of placing a substantial obstacle in the path of . . . seeking an abortion of a nonviable fetus"? 505 U.S. at 877.

In order to answer that question, we must evaluate the evidence presented in this particular case. Before doing so, however, it is also useful to note where the concept of "legislative facts"—on which the majority relies—legitimately applies in this case, and where it does not. Skipping over the crucial question about the way in which facts must be established, the majority treats this case as one in which the factual record is identical to the record in *Karlin* and then assumes that if there was nothing unconstitutional about a two-visit rule in *Karlin* there can be nothing unconstitutional here. Burdens are burdens, no matter what state a court is considering. Furthermore, reasons the majority, that is how the Supreme Court treated efforts to regulate the late-term abortion procedure at issue in *Stenberg*, and thus it must be the way to treat all facts relating to the abortion issue.

With all due respect, the majority has failed to take into account significant differences in the record that was compiled in this case, as compared with the record before the *Karlin* court, and it has made assumptions about inter-state differences that are unsupported in this record (and, I suspect, unsupportable). Once again, I discuss the particular evidence in the present record later. What is important here is to recognize that this evidence is highly pertinent to the case. A central reason why the majority treats this as a "failure of proof" case, to the extent it does, is that it assumes that studies done in Mississippi, or Utah, or North Carolina, have nothing to do with Indiana. This assumption is mysterious.

What we are considering, after all, is a simple matter of human reactions to sets of incentives or disincentives: will a particular measure be seen as a disincentive at all; if so, will the obstacle be a mere inconvenience, or will it effectively ban a particular option? In the field of economics, we assume that people will react in similar and predictable ways to incentives. (And sometimes it takes more than one study to ascertain what the incentive effects of a particular measure are, even if, once understood, those effects are presumed to be universal.) Consistently with that well-accepted proposition, there is every reason here to assume that Indiana women will react to proven incentives and disincentives in the same way women from other states (*e.g.*, Mississippi) have been shown to respond. The Law of Demand is based on generalized assumptions about human behavior and rationality, and there is no reason to waste time trying to prove that people in one area are exceptions to these rules. The Supreme Court relied on the same idea in *Stenberg*: faced with high uncertainty about which procedures were legal and which were not, coupled with draconian penalties for an incorrect guess, it was safe to assume that all doctors, everywhere, would err on the side of caution and refuse altogether to perform certain kinds of late-term abortions. Maybe the Court should have carved out an exception for doctors in places famous for attracting gamblers, like Las Vegas or Atlantic City; but for obvious reasons it did not.

The majority acknowledges that under the Law of Demand, higher prices for abortion will decrease the number demanded, but (as it also appears to recognize) that is not the difficult question here. It is instead whether the observed increase in price caused by the "presence" or two-visit rule is a permissible one under the undue burden analysis. See *City of Los Angeles v. Alameda Books, Inc.*, ___ U.S. ___, 122 S. Ct. 1728, 1742 (2002) (Kennedy, J., concurring) (reduction in demand is merely the first step of an analysis on the permissibility of a regulation: the crucial step is whether that

decrease was achieved through allowable governmental action). That is precisely the issue that the Court identified in *Casey* as an empirical point, where a different result was possible on a more complete record. It is unclear at best to me why the two judges in the majority on this panel think that they know better than the district court judge, who heard all the testimony and weighed all the evidence, what the answer is to the question whether a critical number of Indiana women would experience the "in the presence" rule as such a significant burden that it would effectively prevent them from exercising their constitutionally protected choice. Instead of respecting the district court's extensive work, the majority finds flaws with the evidence on which the court based its factual findings. It thinks, for instance, that the evidence in the record should have taken into account factors like degree of urbanization, average distance to abortion clinics, and income levels. *Ante* at 11.

But this simply leads to the majority's second misunderstanding about the legal significance of the differences between Mississippi and Indiana that these factors might reveal. At best, studies incorporating these variables at a greater level of detail will indicate that there are some women in Indiana for whom the "presence" rule is not a problem, just as there were many women in Pennsylvania who did not anticipate any problem with spousal notification. Surely the majority does not think that every woman in Indiana lives close to a clinic; like all states, Indiana has significant rural areas and significant numbers of people living far from a reproductive health services facility. (There are 11 abortion clinics in Indiana, see Indiana Family Institute, Fact Sheet: Abortion in Indiana, at http://www.hoosierfamily.org/ FactSheet13.html, covering a territory of some 36,000 square miles, see U.S. Census Bureau, State and County QuickFacts, at http://quickfacts.census.gov/qfd/states/18000.html. That adds up to one abortion clinic on the average for almost every

3,300 square miles. And, needless to say, it is quite unlikely that these clinics are distributed with perfect geographical regularity; to the extent the clinics are concentrated around major cities like Indianapolis, that means that other women in rural Indiana will live substantial distances away from the nearest facility.) At most, the details the majority demands might suggest that more Indiana women can withstand the burdens of the Indiana statute than their counterparts in Mississippi could. But the question is not, for example, whether Indiana women as a group live closer to abortion clinics. It is whether an Indiana woman living 60 miles away from a clinic in Indiana who cannot afford (either financially, socially, or psychologically) to make two visits, will respond the same way a Mississippi woman living 60 miles away from a clinic in Mississippi with similar constraints did. To repeat, *Casey* made it clear that the set of women we must consider are those who are burdened by the law, and it found 1% enough to justify striking down the spousal notification rule. Maybe 10% of the women in Mississippi have that problem and "only" 3% of women in Indiana do. No matter. The district court was quite reasonable to find that women in Indiana are like all other people and that their responses will be the same as those of women elsewhere.

Or it could be that the majority thinks that women in Indiana are more likely to be persuaded by the "presence" requirement than are women in Mississippi, so that the decrease in abortions due to the requirement could be attributed to the constitutionally permissible persuasive force of the law. Again, however, all the previous criticisms apply: the question is not whether more women in Indiana are persuaded than are women in Mississippi (bearing in mind that there was no evidence before the district court indicating why that should be the case). It is instead whether a sufficient number of Indiana women (something akin to the 1% of *Casey*) are *not* so persuaded, and yet are among those who will be forced to forego their right to choose.

The majority rejects wholesale the relevance of the Mississippi studies (and several other studies) by implying that the district court clearly erred in its decision that Indiana women would react to burdensome two-visit requirements in the same way, and for the same reasons, as Mississippi women did. But even in this context, it offers no reason at all to believe that Indiana women are so idiosyncratic, nor in my view could it. The Supreme Court has consistently endorsed the use of studies from other states or areas—shared experience is exactly how the "laboratories" in the several states ought to work. See, *e.g.*, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (in the First Amendment context, no requirement that "a city, before enacting such an ordinance, [ ] conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.").

III

Turning now to the evidence demonstrating that the Indiana "presence" rule indeed constitutes an undue burden, we find detailed and meticulous findings from the district court to support that proposition. This evidence was entirely competent to support the district court's decision; *Casey*'s discussion of the spousal notification rule makes it clear that evidence on undue burden does not have to meet some heightened standard of perfection. To the contrary, the Court there relied on "limited research that has been conducted with respect to [the issue at hand, there notifying one's husband about an abortion], although involving samples too small to be representative," 505 U.S. at 892, to support its conclusion about spousal notification.

We have more than zero, and less than perfection, when it comes to information about the burden the Indiana statute places on the women affected by the two-visit rule. The majority, in effect, has not only demanded perfection; it also wants a showing that some number of Indiana women significantly larger than the number the Court accepted in *Casey* are unduly burdened by the law. Every time the plaintiffs come back with more studies and more information (as they have surely done here, in comparison with the record they created in *Karlin)*, the majority raises the bar higher and tells them to come back another day—even though this court has specifically held that "the biases of one study in one case may be avoided or reversed in the next." *Mister v. Illinois Cent. Gulf R.R. Co.*, 832 F.2d 1427, 1437, n.3 (7th Cir. 1987) (Easterbrook, J.).

In this case, we have evidence, and importantly we have significant new evidence that has been developed since *Karlin,* which answers precisely the kinds of questions that *Karlin* directed future plaintiffs to address. The district court relied on this evidence to conclude that the "in the presence" part of the Indiana law would indeed impose an undue burden on enough Indiana women seeking abortions that this part of the statute had to be enjoined. The Supreme Court has consistently endorsed the use of the type of evidence that was presented here, and has analyzed it in the "factual context of each case in light of all the evidence presented by both the plaintiff and the defendant." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). Key among this evidence before the court was a new (post-*Karlin*) study published in the Journal of the American Medical Association (JAMA), one of the most highly respected journals in the medical field, and one that meets any conceivable standard for peer-review. *Cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Robinson v. California*, 370 U.S. 660, 667 n.9 (1962) (relying on findings in JAMA); *Budd v. California*, 385 U.S.

909, 912 n.3 (1966) (Fortas, J., dissenting from denial of certiorari) (same).

The JAMA study is a time-series and regression analysis designed to assess the effect of the Mississippi law on the abortion and birth rates of Mississippi residents in two ways: first, through a retrospective analysis of those rates before and after the passage of the statute, and second, through a comparison between Mississippi and two similar states, Georgia and South Carolina, neither of which had a "presence" requirement in effect at the relevant time but were otherwise similar in the relevant respects. Regression analyses are an important tool in much of social science research, as well as in law. See *McCleskey v. Kemp*, 481 U.S. 279, 293-94 (1987) (discussing their role in Title VII of the Civil Rights Act of 1964 cases and in sentencing context); see also *Bazemore v. Friday*, 478 U.S. at 398-401 (additional regression analyses conducted in response to criticisms and suggestions by the district court, all of which confirmed, and some of which even strengthened, the study's original conclusions; further concluding that multiple-regression analysis need not include every conceivable variable to establish a party's case; and chiding the court of appeals because it "failed utterly to examine the regression analyses in light of all the evidence in the record"); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977) (discussing jury selection context).[3]

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[3] It is worth reviewing for a moment what this kind of study does. A regression takes a dependent variable (here, the decrease in abortions or abortion rates) and tests it against a number of independent variables. The independent variables are chosen before the regression is run; here, for example, they included factors like the opening of new clinics, changes in marriage rates, changes in the percentage of the population living in metropolitan areas, the increased availability of contraceptives, and changes in per capita income. Once the data is collected, the researcher runs a regression on each variable, which shows the effect of that

The difficulty here is that there is no single independent variable that will show "undue burden." The only way to prove that a particular part of a law is imposing an undue burden on abortion choice is to hypothesize that it *might* constitute an undue burden, and then to show that no other reasonably related variable satisfactorily explains the drop in abortion rates (*i.e.*, the phenomenon that is being tested)—essentially a process of elimination. This is a methodology we have approved before. See *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (per curiam). In that case, this court endorsed the use of simple linear regressions as a way to draw out all other plausible explanations leaving only the hypothesized one as a reason for what part of a loss in business was attributable to a massive oil spill. *Id.* at 1320. We expressed satisfaction there with this way of getting "a better grip on the relation between dependent and independent variables" and reaching "an inference of causation, and of the size of the effect." *Id.* Indeed, the latest pronouncement by the Supreme Court in First Amendment matters endorses a study by the city of Los Angeles aimed at demonstrating the connection between its ban on multiple-use adult establishments and its interest in reducing crime—a connection that can only be shown by ruling out some (but clearly not all) of the other potential independent variables that could have contributed to the effect on crime. See *City of Los Angeles v. Alameda Books, Inc.*, *supra*, ___ U.S. ___, 122 S.Ct. 1728 (plurality opinion). Dealing with the nature of such studies, the plurality concluded that a party "does not bear the burden of providing evidence that rules out every [other] theory." *Id.* at 1735. The study, however imperfect, was respected for its probative value precisely because of the lack of evidence presented by the other side to rebut its finding. As in this case, once the point was made, the

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variable, in isolation, on the dependent variable. If a variable is found to have no meaningful correlation to the dependent variable, it is discarded.

opponent had to produce concrete evidence on the other side; it was not enough merely to point out an alleged imperfection in the study. *Id.* (respondents did "not offer a competing theory, let alone data" to counter the city's assertions).

That is exactly what the JAMA study did. It was tailored to explore the question (unanswered in the record in *Karlin*) whether the decrease in abortions in Mississippi was an effect not of the persuasive power of the law, but rather of its burdensome qualities. And it showed that the latter explanation was the correct one. The principal outcome measures in the study were birth rates, abortion rates, the percentage of late abortions, and the percentage of abortions performed outside the state. The researchers found that the resident abortion rates declined 12% more in Mississippi than they did in South Carolina after the passage of the law, and they declined 14% more in Mississippi than they did in Georgia. Limited to Caucasian adults, abortions declined 22% more in Mississippi than in South Carolina and 20% more in Mississippi than in Georgia. Abortions performed after the 12-weeks gestation mark increased 39% more in Mississippi than in either South Carolina or Georgia. The percentage of abortions performed out-of-state increased 42% more among women in Mississippi relative to women in South Carolina.

The JAMA study also showed that in the 12-month period after the law took effect, the total rate of abortions for Mississippi residents decreased by approximately 16%; the proportion of Mississippi residents traveling to other states for an abortion increased by about 37%; and the number of second trimester abortions increased by some 40%. The study concluded that these statistics "suggest that Mississippi's mandatory delay statute was responsible for a decline in abortion rates and an increase in abortions performed later in pregnancy." The researchers who conducted the study testified before the district court that the

only salient difference among Mississippi, Georgia, and South Carolina for these purposes was that only Mississippi had a two-trip requirement. Otherwise, the laws regulating abortions in the three states were functionally the same—and no other statistically significant events had taken place in the various states.

The district court realized that it needed to address one final, but critical, question of fact: were declines observed in abortions in Mississippi because women in Mississippi had been persuaded to forego abortions, or were the declines because the new law was impermissibly burdening the right to seek an abortion—precisely the inquiry mandated by *Karlin*. The court found that the latter explanation was the correct one, for several reasons, all amply based on the evidence in the record. First, the "persuasive power" hypothesis was severely undercut by the evidence showing that Mississippi women were leaving the state to have their abortions elsewhere and having more second-trimester abortions. Those women quite evidently had not been persuaded to carry their pregnancy to term; they aborted their pregnancies, but they did it outside the state of Mississippi or at a later and riskier time. (And certainly we must assume that the Mississippi legislature was trying to persuade women to forego abortion, rather than to persuade them to travel out-of-state for the procedure or to postpone it to a riskier time.) Second, the court looked at evidence from Indiana itself that showed no changes in abortion rates from the information standing alone (a part of the statute that the court permitted to take effect, stripped only of the "presence" requirement). The court discussed other evidence as well, and I commend its thorough analysis, particularly its evaluation of similar studies conducted in Utah and Louisiana. In the end, its conclusion was that the "sum of this evidence, and the absence of evidence of any persuasive effect, shows convincingly that the predicted reduction in abortion rates would result not from persuasion but from restrictions posing

a substantial obstacle for some women's ability to obtain abortions." As mentioned before, even if the relative numbers of women who were persuaded versus burdened are different in Mississippi and Indiana, the study conclusively reveals that a significant number of Indiana women will be unduly burdened by the "presence" requirement. And those women—not those who are persuaded, or unaffected, or not even contemplating an abortion—are those on whom the majority should have concentrated under *Casey* and *Stenberg*.

Whether this court is looking at the record *de novo*, under an abuse of discretion standard, or merely for clear error, the district court's findings should stand. I find nothing in the majority's speculation that comes close to refuting the evidence upon which the court relied. See *City of Los Angeles*, 122 S. Ct. at 1735 (disapproving of fact that the "Court of Appeals simply replaced the city's theory . . . with its own" and that its analysis "implicitly requires the city to prove that its theory is the only one that can plausibly explain the data"). Only by disregarding key points such as the number of women who willingly undertook the burden of seeking an abortion out-of-state, where they could have the entire procedure accomplished in one visit, rather than staying in-state and enduring the two-visit burden, can the majority come to the result it does.

IV

Finally, although not necessary to my analysis, it is worth noting that *Casey* said that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877 (emphasis added). The majority considers only the "effect" part of that disjunctive test, perhaps thinking that

this court's dismissal of the "purpose" half in *Karlin* was binding on the Supreme Court. I am under no such illusion. I believe, therefore, that it is appropriate to take a brief look at the purpose Indiana offered for this regulation, to see if it might either help to save the statute or to condemn it.

The district court found that "[t]here is no evidence tending to show how the 'in the presence' requirement actually furthers the state's legitimate interests in maternal health or in protecting potential life." It said this, importantly, after the plaintiffs had made an extensive *prima facie* showing that the statute furthered neither legitimate interest; in the sense of a burden of production, the court was concerned that Indiana had offered nothing to the contrary. (Indiana argues strenuously that the district court imposed an impermissible shift in the ultimate burden of proof, but it is clear from the court's opinion as a whole that it did no such thing; it was simply addressing the evidentiary vacuum on Indiana's side in the face of the plaintiffs' evidence.)

Indeed, my search of the legislative history of the Indiana statute reveals no reason whatsoever for imposing a two-visit requirement for the dissemination of the required information. Acting as if it were conducting rational basis review, the majority speculates that some Indiana legislator might have thought that absorption of information occurs more effectively when it is transmitted in person. Maybe so, but that does not explain why the state could not simply have said that at the point of checking into the clinic, the previously transmitted information must be reiterated in person. The change from an oral communication to an "in the presence" requirement was added by a floor amendment in the House of Representatives that was marked by scant debate. After some members of the House suggested that the "in the presence" requirement was intended as an obstacle to abortion, its chief sponsor stated instead that the concern was that unless the information was given in person, "how do you

know this is the doctor or the person you're supposed to be talking to. . . . I would think you would want to talk personally to the person who may be performing that and know . . . that they are the person indeed that they [say they] are." A special concern with impostor doctors, or generally with practitioners not being who they say they are over the telephone is not a problem that is specific to abortion—or at least there were no such findings other than a statement that this possibility (of talking to an impostor) "is very dangerous, especially when you're talking about the symptoms and consequences of an abortion." Literally the only other scrap of evidence from the legislature seems to reflect a fear that women would receive the information while they were under sedation on an operating table. But that cannot be what the legislature really feared, for the simple reason that this concern is already addressed in Indiana's law of "informed consent," which cannot be given by persons already under anaesthesia. See, *e.g.*, *Culbertson v. Mernitz*, 602 N.E.2d 98, 103 (Ind. 1992) (endorsing the American Medical Association's 1992 Code of Medical Ethics with respect to necessary consent, and rejecting as invalid consent given "where the patient is unconscious or otherwise incapable of consenting"). I would be surprised if many Indiana doctors were in the habit of obtaining consent for medical procedures from unconscious or drugged patients; they would risk loss of their medical license if they did, whether they were performing an appendectomy, knee surgery, a vasectomy, a prostate removal, or an abortion. The law of informed consent is consistent across the spectrum of surgeries and procedures: if no reason is given why heightened consent is needed in the abortion context, then this cannot be accepted as the reason for the "in the presence" requirement.

V

For all these reasons, I believe that the majority has seriously mis-applied the *Casey* test. It has substituted its own factual assumptions for evidence that is in the record; it has failed to focus on the women for whom that statute will create problems; and it seems to think that the *Casey* Court was not serious when it emphasized the lack of evidence in the record before it, by implying that the result in *Casey* dictates the result here. I respectfully dissent.

A true Copy:

Teste:

/s/_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

A WOMAN'S CHOICE-EAST SIDE WOMEN'S CLINIC; Indianapolis Women's Facility; A Clinic for Women, Inc.; Planned Parenthood of Central and Southern Indiana, Inc.; Fort Wayne Women's Health Organization, Inc.; Ulrich G. Klopfer, D.O.; Women's Pavilion, Inc.; and Friendship Family Planning Clinic of Indiana, on behalf of themselves and their patients seeking abortions,

Plaintiffs,

v.

Scott C. NEWMAN, in his official capacity as Prosecuting Attorney for Marion County, and as representative of the class of all prosecuting attorneys in the State of Indiana; and John C. Bailey, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Defendants.

CAUSE NO. IP 95-1148-C H/G.

No. IP 95-1148-C H/G.

March 30, 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAMILTON, District Judge.

An Indiana law enacted in 1995 requires in almost all cases that at least 18 hours before an abortion can be performed, a woman must be given certain state-mandated information concerning the abortion and alternatives to abortion. See Ind. Code § 16-34-2-1.1. The law specifically

requires that medical personnel provide some of this advance information "in the presence" of the pregnant woman. The "in the presence" provision would require most women to make two trips to a clinic in order to obtain an abortion.

Plaintiffs in this case are reproductive health care facilities that provide a range of services related to pregnancy and women's health, including abortions up to 12 weeks of gestation, and a licensed physician who performs abortions. Plaintiffs contend the "in the presence" requirement is unconstitutional because it imposes an undue burden on a woman's constitutional right to choose to end a pregnancy.

The Indiana statute is similar to a Pennsylvania law upheld by the Supreme Court against a facial challenge in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992), as well as a Wisconsin law upheld by the Seventh Circuit in *Karlin v. Foust*, 188 F.3d 446 (7th Cir.1999). Both decisions left open the possibility, however, that additional evidence on the effects of such laws could establish an undue burden. In this case, plaintiffs have presented evidence on the effects of such "in the presence" requirements that was not presented to the courts in *Casey* or *Karlin*. The additional evidence shows that Indiana's "in the presence" requirement is likely to impose an undue burden on the ability of many women to exercise their constitutional right to choose to end a pregnancy.

The evidence shows that the burden imposed by the "in the presence" requirement is likely to prevent abortions for approximately 10 to 13 percent of Indiana women who would otherwise choose to have an abortion—roughly 1300 to 1700 per year. Plaintiffs have also shown it is highly unlikely that the effects of the law will result from any persuasive effect the state-mandated information might have. There is no evidence from other states or from Indiana showing that requiring such state-mandated information to be

provided to a woman in advance of an abortion (whether in person or otherwise) actually persuades women to choose childbirth over abortion.

Accordingly, as explained below, the "in the presence" provision imposes an undue burden on a woman's constitutional right to choose to end a pregnancy. The court is entering a permanent injunction against enforcement of the "in the presence" requirement, which is severable from the other provisions of Public Law 187. This entry sets forth the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52. The substance rather than the court's label shall determine whether a matter is a finding of fact or a conclusion of law.

I. *The Indiana Statute*

Indiana has long required physicians performing abortions to obtain the informed consent of their patients, just as they must obtain informed consent for other medical procedures. Informed consent generally requires that the patient be told the general nature of her condition, the proposed treatment or procedure, the expected outcome, the material risks, and the reasonable alternatives to the treatment or procedure. *See* Ind. Code § 34-18-12-3 (informed consent for purposes of medical malpractice action).

Indiana's "informed consent" requirements for abortions reach well beyond the more general requirements for medical procedures. Abortions in Indiana are criminal unless a number of conditions are satisfied, one of which is that "the woman submitting to the abortion has filed her consent with her physician." Ind. Code § 16-34-2-1(1)(B). Indiana Public Law 187-1995 (referred to here as "Public Law 187") added special mandatory disclosure and waiting period provisions for informed consent for abortions. The law requires in almost all cases that certain medical information and

information about alternatives to abortion be provided to a woman orally at least 18 hours before she may have an abortion. Some of the medical information must be provided "in the presence of the pregnant woman." The law was drafted to have gone into effect on September 1, 1995, but it was enjoined from operation first by this court's temporary restraining order and then by this court's preliminary injunction. *A Woman's Choice—East Side Women's Clinic v. Newman*, 904 F. Supp. 1434 (S.D.Ind.1995).

The central provisions of Public Law 187 state:

> An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if the following conditions are met:
>
> (1) At least eighteen (18) hours before the abortion and in the presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice nurse (as defined in IC 25-23-1-1(b)), or a midwife (as defined in IC 27-12-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:
>
> (A) The name of the physician performing the abortion.
>
> (B) The nature of the proposed procedure or treatment.
>
> (C) The risks of and alternatives to the procedure or treatment.
>
> (D) The probable gestational age of the fetus, including an offer to provide:
>
> (i) a picture or drawing of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus; at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care from the county office of family and children.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

(3) The pregnant woman certifies in writing, before the abortion is performed, that the information required by subdivisions (1) and (2) has been provided.

Ind. Code § 16-34-2-1.1. Anyone who knowingly or intentionally performs an abortion in violation of these requirements is subject to criminal penalties. Ind. Code §§ 16-34-2-1, 16-34-2-7. The evidence here shows that only a few women are referred to abortion providers by other physicians. See Ex. 25 (approximately four percent of patients in one clinic were referred by outside physician). Thus, the practical effect of the "in the presence" requirement

is to require a woman to make two trips to an abortion clinic in order to obtain an abortion.[1]

II. Procedural Background

Plaintiffs filed their complaint on August 24, 1995, asserting that Public Law 187 would impose undue burdens on a woman's constitutional right to choose to end a pregnancy.[2] Defendants are a class consisting of all prosecuting attorneys in the State of Indiana, with Scott C.

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[1] Exhibit 25 was considered when the court issued its preliminary injunction. See *A Woman's Choice*, 904 F. Supp.. at 1453. Defendants have not sought to revisit the question of this practical effect. Public Law 187 also contains an exception to the disclosure and waiting period requirements when a woman faces a "medical emergency," which is defined to mean: "a condition that, on the basis of the attending physician's good faith clinical judgment, complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function." Ind. Code § 16-18-2-223.5. The Supreme Court of Indiana has construed this language broadly to include any situation in which "the attending physician, in the exercise of her clinical judgment in light of all factors relevant to a woman's life or health, concludes in good-faith that medical complications in her patient's pregnancy indicate the necessity of treatment by therapeutic abortion," including "serious and permanent mental health issues." *A Woman's Choice-East Side Women's Clinic v. Newman*, 671 N.E.2d 104, 111 (Ind.1996) (answering certified questions in this case). Plaintiffs are no longer pursuing their challenge to the medical emergency language of Public Law 187.

[2] In their complaint, plaintiffs also challenged an Indiana statute providing that abortions after the first trimester may be performed only "in a hospital or ambulatory outpatient surgical center." Ind. Code § 16-34-2-1(2)(B). Plaintiffs did not request a preliminary injunction against that provision and have not presented evidence concerning it. That claim is dismissed without prejudice.

Newman of Marion County as representative of the class; and the Commissioner of the Indiana Department of Health. [3]

On August 25, 1995, plaintiffs filed a verified motion for a preliminary injunction and expedited hearing, asserting that enforcement of Public Law 187 would cause immediate and irreparable harm. After a hearing on August 30, 1995, the court entered a temporary restraining order enjoining enforcement of the challenged law for ten days. The court also issued an order certifying the defendant class.[4] The parties agreed to a short extension of the temporary restraining order, and the court heard evidence on plaintiffs' motion for a preliminary injunction on October 11-13, 1995. Also on October 13, 1995, defendants filed a motion to certify the interpretation of the medical emergency exception to the Supreme Court of Indiana.

On November 9, 1995, the court issued a preliminary injunction enjoining enforcement of Public Law 187. See *A Woman's Choice*, 904 F. Supp. 1434. The court also granted defendants' motion to certify the interpretation of the medical emergency exception to the Supreme Court of Indiana. After the state court answered certified questions about the scope of the medical emergency exception, defendants moved to vacate or modify this court's preliminary injunction. On October 14, 1997, this court modified its preliminary injunction. See *A Woman's Choice-East Side Women's Clinic v. Newman*, 980 F. Supp. 962 (S.D.Ind.1997). The state court's construction of the medical emergency

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[3] Plaintiffs originally named John C. Bailey as a defendant in his official capacity. Pursuant to Fed. R. Civ. P. 25(d), Gregory Wilson has been substituted as the current Commissioner of the Indiana Department of Health.

[4] The court's original order certifying the defendant class invited further consideration of the issue. Neither side has raised the class issue since then.

exception persuaded this court that the law's enforcement should not be enjoined entirely. However, the court found that the grounds for the preliminary injunction against enforcement of the "in the presence" requirement in Public Law 187 remained valid and that the requirement was severable from the remaining portions of Public Law 187.

The court therefore modified its preliminary injunction to permit enforcement of the waiting period and mandatory disclosure provisions of Public Law 187, concluding that, on the record before the court, plaintiffs were not likely to succeed in showing that the mandatory disclosure and waiting period requirements would impose burdens that would actually prevent a substantial number of women from having abortions they would otherwise choose to have. The court also concluded that plaintiffs were still likely to succeed on their challenge to the "in the presence" requirement. The court therefore also modified its injunction against enforcement of that requirement by directing that the state-mandated information could be provided by telephone.

Plaintiffs now challenge the constitutionality of only the "in the presence" requirement of Public Law 187. The record at this point includes evidence from the earlier stages of this case, a court trial on November 1-2, 1999, and later written supplements to the evidence by both sides. After post-trial briefing and further evidentiary submissions in writing, the court heard additional argument. The issues have been fully briefed and are ripe for decision.

III. *Legal Framework Governing Abortion Regulations*

A. The "Undue Burden" Standard

"The issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that, as the Court recognizes, involve 'virtually irreconcilable points of view.' ". *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 2617-

18, 147 L. Ed. 2d 743 (2000) (O'Connor, J., concurring). Notwithstanding the contention and controversy, some broad principles have been established by the Supreme Court.

First, before viability of the fetus, a woman has a right under the United States Constitution to choose to terminate her pregnancy. *Stenberg*, 120 S. Ct. at 2604, citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (controlling joint opinion of O'Connor, Kennedy, and Souter, JJ.). [5]

Second, "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional. *Stenberg*, 120 S. Ct. at 2604, quoting *Casey*, 505 U.S. at 877, 112 S. Ct. 2791. An "undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* The standard has two distinct and independent prongs, based on the purpose of the law and the effect of the law. Either may be sufficient to find an undue burden.

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[5] The joint opinion signed by Justices O'Connor, Kennedy, and Souter, and joined in part by Justices Blackmun and Stevens, provided the narrowest grounds for the judgment of the Court on all questions. That opinion therefore states the controlling holdings of the Court. See *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990 (1977) (when no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by the Justices who concurred in the judgment on the narrowest grounds). Accordingly, the Court majority in Stenberg and several dissenting justices treated the joint opinion in *Casey* as the controlling statement for the court. See *Stenberg*, 120 S. Ct. at 2604 (majority); *id.* at 2621 (Rehnquist, C.J., dissenting) (citing *Marks*); *id.* at 2625 (Kennedy, J., dissenting); *id.* at 2636 (Thomas, J., dissenting).

Casey and *Stenberg* together establish the "undue burden" standard as the controlling test for evaluating state regulations of abortions. The unadorned language of the undue burden test—determining whether a state law has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"—does not draw sharp lines on the legal map. This court's task in this case is to apply the undue burden test to the evidence in this case. For purposes of this case, the best guide to the meaning of the Supreme Court's language is the Court's application of the test in *Casey* itself.[6]

At issue in *Casey* were Pennsylvania statutes that required disclosures of state-mandated information to the woman before she could give informed consent; required a woman to wait 24 hours after such disclosures before obtaining an abortion; required a minor to have parental consent prior to obtaining an abortion; and required a married woman to notify her husband before obtaining an abortion.

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[6] In *Stenberg*, the Court addressed a Nebraska law prohibiting particular surgical methods used in late-term abortions. The Court found that the state law imposed an undue burden in two different respects. First, the law lacked the constitutionally required exception "for the preservation of the life or health of the mother." 120 S. Ct. at 2613. In this case, however, the Supreme Court of Indiana has saved Public Law 187 with respect to protecting the health of the woman by giving an expansive reading to the statutory language of the medical emergency exception. See *A Woman's Choice*, 671 N.E.2d at 111. That application of the undue burden standard in *Stenberg* therefore is not in dispute here. Second, the Nebraska law in *Stenberg* imposed an undue burden by outlawing both the "dilation and evacuation" procedure used most commonly in second trimester abortions, as well as the rare "dilation and extraction" method. 120 S. Ct. at 2613. In fact, Nebraska agreed that if the statute were properly construed to bar both methods, it would impose an undue burden. *Id.* The specific issues in this case are so different from those in *Stenberg* that the Supreme Court's applications of the undue burden standard in *Casey* itself provide more specific guidance.

The controlling joint opinion by Justices O'Connor, Kennedy, and Souter in *Casey* articulated the undue burden standard and then applied it to those statutory requirements. A majority of the Court held that the requirements of mandatory disclosure, a 24-hour waiting period, and parental consent for minors had not been shown to impose an undue burden on women seeking pre-viability abortions. See 505 U.S. at 885-87, 899-900, 112 S. Ct. 2791 (O'Connor, Kennedy, Souter, JJ.), id. at 967-71, 112 S. Ct. 2791 (Rehnquist, C.J., joined by White, Scalia, Thomas, JJ.). A different majority of the Court struck down the requirement that a married woman notify her spouse before seeking an abortion because the requirement was likely to prevent a significant number of women from obtaining an abortion. See 505 U.S. at 893, 112 S. Ct. 2791 (O'Connor, Kennedy, Souter, JJ., joined by Blackmun and Stevens, JJ.).

Pennsylvania's spousal notification requirement was the only provision for which the Court found sufficient evidence of an undue burden on a woman's right to choose to terminate a pregnancy. The portion of the joint opinion striking down that requirement therefore provides the surest guide to the type of showing required to meet the undue burden standard in a facial challenge. See *Karlin v. Foust*, 188 F.3d at 480 (acknowledging instructive significance of this portion of *Casey*); see also *Casey*, 505 U.S. at 920 n. 6, 112 S. Ct. 2791 (Stevens, J.) ("The meaning of any legal standard can only be understood by reviewing the actual cases in which it is applied.").

When the *Casey* Court struck down the spousal notification law, the record did not include statistical evidence of the effects of any similar spousal notification requirements in other states. The record included substantial evidence and findings of fact on the frequency of domestic violence and the role that pregnancy often plays as a flashpoint for such violence against women and their

children. See 505 U.S. at 887-92, 112 S. Ct. 2791. The Court also considered "limited research" on spousal notification requirements that involved "samples too small to be representative." *Id.* at 892, 112 S. Ct. 2791. That research also supported findings of fact indicating that, when married women do not notify their husbands of their decisions to have an abortion, in most cases the pregnancy is the result of an extramarital affair or, if the husband is the father, the husband and wife are experiencing marital difficulties, often accompanied by violence. *Id.* The Court concluded that the research and the district court findings "reinforce what common sense would suggest." *Id.* at 892-93, 112 S. Ct. 2791. Although spouses in healthy marriages discuss such important and intimate decisions, "there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion." *Id.* at 893, 112 S. Ct. 2791.

The fact that a law may make abortions more difficult or expensive to obtain does not, the joint opinion in *Casey* emphasized, necessarily show that the law imposes a substantial obstacle. *Id.* at 893-94, 112 S. Ct. 2791. What made the difference for the Court was the evidence supporting the following conclusion about the spousal notification law: "We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.* at 894, 112 S. Ct. 2791.

The defendants in *Casey* argued that the spousal notice requirement could not be an "undue burden" because it would affect only about one percent of women seeking

abortions. (About 20 percent of women seeking abortions were married, the evidence showed, and 95 percent of those women notified their husbands on their own.) The Court rejected the argument: "The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." 505 U.S. at 894, 112 S. Ct. 2791. The Court recognized the target of the legislation as married women seeking abortions who did not wish to notify their husbands of their intentions and who did not qualify for one of the exceptions to the requirement. The Court found that the prospect of domestic violence would mean that, "in a large fraction of the cases in which [the requirement] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid." *Id.* at 895, 112 S. Ct. 2791. The Court did not quantify more precisely the "large fraction" or its denominator.

The portion of the joint opinion in *Casey* addressing the mandatory disclosure and waiting period requirements in the Pennsylvania law is also highly instructive here, of course, especially since the Indiana law was modeled on the Pennsylvania law upheld in *Casey*. The joint opinion recognized that the law would impose some burden on women seeking abortions in terms of increased cost and delay, but the Court was not persuaded that those burdens were so great as to be "undue burdens." See *id.* at 886-87. The Court acknowledged the district court's findings that delays would require two trips to a clinic, thus increasing exposure of women to "the harassment and hostility" of protesters at clinics, and that "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.' " 505 U.S. at 886, 112 S. Ct. 2791, quoting 744 F. Supp. 1323, 1352

(E.D. Pa.1990). The Court described these findings as "troubling in some respects," but inadequate to demonstrate that the waiting period imposed an "undue burden." 505 U.S. at 886, 112 S. Ct. 2791. The Court concluded: "Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden." *Id.* at 887, 112 S. Ct. 2791.

That conclusion in *Casey* left the door open for possible future challenges, such as the one here, to similar state laws modeled after the Pennsylvania statute if parties challenging such laws could come forward with evidence that would meet the "undue burden" standard. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309, 1313, 114 S. Ct. 909 (1994) (Souter, Circuit Justice) (denying application for a stay of Court of Appeals' refusal on remand to consider additional evidence on the likely effects of Pennsylvania's statute, but noting that "litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied"); *Karlin v. Foust*, 188 F.3d at 484 ("We conclude plaintiffs are not precluded from challenging a waiting period provision nearly identical in all respects to the one upheld in *Casey*.").

The parties here have recognized, as the Supreme Court and the Seventh Circuit have taught, that application of the effects prong of the undue burden standard to similar laws could lead to different results in different states. Such different results may occur either because new evidence is presented regarding the actual effects of such laws, or perhaps because of demographic or geographic factors unique to a particular state. Thus, the Supreme Court's decision in *Casey* did not control the validity of a similar law in Wisconsin where different evidence was presented. See *Karlin*, 188 F.3d at 485 (recognizing that *Casey*'s decision to uphold Pennsylvania law did not control constitutionality of

Wisconsin law). Nor should the Wisconsin case control the validity of Indiana's law in a case where additional and different evidence has been presented.[7]

B. *Burden of Proof for a Facial Challenge*

Plaintiffs have brought a facial challenge to the "in the presence" requirement before it could take effect. In bringing a facial challenge, "a party seeks to vindicate not only [her] own rights, but those of others who may also be adversely impacted by the statute in question." *Chicago v. Morales*, 527 U.S. 41, 55 n. 22, 119 S. Ct. 1849 (1999). "When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, and not just in its particular application to the party in suit." *Id.* at 74, 119 S. Ct. 1849 (Scalia, J. dissenting) (emphasis in original). In a facial challenge, those challenging an abortion regulation do not have to wait for the law to take effect and cause them harm.

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[7] In the *Hope Clinic* opinions, the Seventh Circuit's majority and dissent debated the consequences of conflicting factual findings by two district courts on medical issues related to procedures used in late-term abortions. See *Hope Clinic v. Ryan*, 195 F.3d 857, 873 (7th Cir.1999) (*en banc*) (stating "that none of the Supreme Court's decisions in abortion cases suggests that the same law would be constitutional in one state, and unconstitutional in another, depending on a district court's resolution of factual disputes"), *vacated*, 530 U.S. 1271, 120 S. Ct. 2738 (2000); *Hope Clinic*, 195 F.3d at 883-85 (Posner, J., dissenting) (addressing problems posed when constitutionality of similar state statutes depends on factual findings of district judges in different cases and arguing that effects of law should be treated as legislative facts rather than adjudicative facts). In *Hope Clinic*, the Court of Appeals was dealing with conflicting findings from two district courts made at essentially the same time on essentially the same medical issues. With respect to "in the presence" requirements, however, the available evidence has been growing over time. This court has before it evidence that was not presented to the district court or the Court of Appeals in *Karlin v. Foust*.

Since *Casey* was decided in 1992, the lower federal courts have debated whether facial challenges to laws regulating abortions should be governed by the "undue burden" standard as the Court actually applied it in *Casey* or by the so-called "*Salerno* standard," which requires a demonstration "that no set of circumstances exists under which the [statute] would be valid." See *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095 (1987) (upholding federal Bail Reform Act against facial challenge under Eighth Amendment). The Court in *Casey* did not expressly overrule or reject the *Salerno* standard, but the Court did not apply the standard in evaluating the facial challenge to Pennsylvania's abortion regulation. The joint opinion in *Casey* found that a woman's right to choose to terminate or continue her pregnancy must be protected from "undue burdens" imposed by a state regulation. *Casey*, 505 U.S. at 876, 112 S. Ct. 2791. The joint opinion further held that a regulation imposes an undue burden if it operates as a substantial obstacle to "a large fraction" of the women "for whom the law is a restriction." *Id.* at 895, 112 S. Ct. 2791. Applying this standard, the Court struck down the statute's spousal notification requirement, finding that the provision was likely to pose a substantial obstacle to a significant fraction of the women affected by the restriction. *Id.* at 893-97, 112 S. Ct. 2791.

The apparent tension between *Casey* and the *Salerno* standard for facial challenges has resulted in a circuit split regarding the proper standard for facial challenges to abortion regulations. See *Hope Clinic v. Ryan*, 195 F.3d 857, 865 (7th Cir.1999) (*en banc*) ("Courts of appeals are divided on the question whether *Salerno* applies to abortion legislation."), *vacated*, 530 U.S. 1271, 120 S. Ct. 2739 (2000); *Carhart v. Stenberg*, 192 F.3d 1142, 1149 (8th Cir.1999) ("In considering a challenge to the facial validity

of an abortion regulation, we follow the standard set out in *Casey*."), *aff'd*, 530 U.S. 914, 120 S. Ct. 2597.[8]

In ruling on plaintiffs' motion for a preliminary injunction, this court concluded that "*Casey* effectively displaced *Salerno*'s application to abortion laws." *A Woman's Choice*, 904 F. Supp. at 1448, citing *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458 (8th Cir.1995) ("We choose to follow what the Supreme Court actually did-- rather than what it failed to say--and apply the undue-burden test."). This court adheres to that view, follows what the Supreme Court has actually done in

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[8] See also *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1025-27 (9th Cir.1999) (reviewing split among lower courts and concluding that *Casey* is the proper standard in the context of facial challenges to abortion statutes), *as amended by*, 193 F.3d 1042 (9th Cir.1999) (amending prior opinion and denying rehearing) (O'Scannlain, J., dissenting from denial of rehearing and criticizing panel for finding that *Salerno* standard no longer applies to facial challenges to abortion statutes); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997) (finding "that Salerno is not applicable to facial challenges to abortion regulations" and applying *Casey* standard); *Manning v. Hunt*, 119 F.3d 254, 268 n. 4 (4th Cir.1997) (applying Salerno standard of review because the parties did not challenge the district court's application of this standard, and noting that the Supreme Court had not expressly overruled Salerno); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1104 (5th Cir. 1997) ("As far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to assume that the Court will abandon *Salerno* because three members of the Court now desire that result."), vacated on other grounds, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir.2001) (*en banc*); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir.1996) (rejecting district court's use of *Salerno* standard and finding "that the proper test after *Casey* is the 'undue burden' standard applied by the Court in that case"); *Barnes v. Moore*, 970 F.2d 12, 14 & n. 2 (5th Cir.1992) (per curiam) (noting that the "*Casey* joint opinion may have applied a somewhat different standard" than *Salerno*, but refusing to "interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent" governing facial challenges).

Casey and *Stenberg*, and applies the undue burden standard as applied in those cases.

IV. *The Effects Prong of the Undue Burden Test*

In applying the effects prong of the undue burden test, the question is whether the "in the presence" requirement of Public Law 187 is likely to impose an "undue burden" on Indiana women who seek to have abortions. In terms of *Casey*, would the law operate to place a "substantial obstacle" in the path of "a large fraction" of the women for whom the law operates as a restriction? See 505 U.S. at 895, 112 S. Ct. 2791. The best available guide to answer this question in this facial challenge comes from the post- *Casey* experience in other states that have implemented "two-trip" requirements, as well as from the experience in Indiana and other states that have implemented waiting period and mandatory disclosure requirements without requiring two trips. Mississippi has been studied most closely, but evidence in this record also pertains to Utah, Louisiana, North Dakota, and Indiana itself.

In applying the undue burden test, it is important to distinguish between two factual questions. The first is whether "two-trip" laws have a significant effect on abortion rates and practices. That issue is the subject of extensive statistical evidence and debate. As explained below, the answer is yes. The court finds as a fact that enforcement of the "in the presence" requirement in Indiana, which effectively requires two trips to an abortion clinic, (a) is likely to cause a significant decline of approximately 10 to 13 percent in the rate for Indiana women having abortions, which amounts to approximately 1300 to 1700 per year; (b) is likely to cause significant increases in travel out-of-state to have abortions; and (c) is likely to cause a significant increase in the proportion of second trimester abortions, which are both riskier and more expensive than earlier abortions.

Proof that the law is likely to cause a decrease in the abortion rate is not sufficient by itself, however, to show that the "in the presence" requirement would impose an undue burden on women. Putting aside for the moment the increase in second trimester abortions and the changes in interstate travel for abortions, if the effect of the law, with its combination of state- mandated information and the required waiting period, were to persuade women to change their minds about whether to have an abortion, that effect would be constitutional under *Casey*. *Casey* upheld the Pennsylvania waiting period and mandatory disclosure law precisely because the state was entitled to take some measures to try to persuade women not to have abortions. See 505 U.S. at 883, 112 S. Ct. 2791.

The second factual issue, therefore, is whether the expected reduction in abortion rates would result from any persuasive effect the law might have, or whether the reduction would result instead from the law posing substantial obstacles for women seeking abortions. That question cannot be answered by examining only the abortion rate statistics in states requiring two trips to clinics. However, states that require mandatory disclosures and waiting periods without requiring two trips have not shown any significant reduction in abortion rates resulting from those requirements. That evidence indicates that such laws have no detectable persuasive effects. There is also a complete lack of any other evidence tending to show that mandatory disclosures and waiting periods have any persuasive effect. In addition, the evidence shows that a two-trip law is likely to increase the number of women leaving the enacting state to obtain abortions in other states and to decrease the number of women from other states coming to the enacting state to have abortions, and to increase the frequency of later abortions. The sum of this evidence, and the absence of evidence of any persuasive effect, shows convincingly that the predicted reduction in abortion rates

would result not from persuasion but from restrictions posing a substantial obstacle for some women's ability to obtain abortions.

Accordingly, the court further finds as a fact that the likely effects of the "in the presence" requirement would not be the result of any persuasive effect of the state-mandated information or the required waiting period. The likely effects would instead result from the burdens that the "in the presence" requirement would impose on women. The court explains next the evidence supporting these findings on the reduction in rates and other effects of the law, as well as the reasons for the reduction.

A. *Effects of "In the Presence" Requirements on Abortion Rates*

1. *The Evolution of the Data*

The parties have submitted extensive evidence relevant to the effects prong of the undue burden test. In a sense, the litigation process has produced an ongoing dialogue among expert statisticians and judges in this case and in *Karlin v. Foust*. From the outset of this case, plaintiffs have relied primarily on Dr. Stanley Henshaw, a statistician with the Alan Guttmacher Institute. After this court's preliminary injunction decision in 1995, Dr. Henshaw also testified in the case challenging the similar Wisconsin law in *Karlin*. The State of Wisconsin in *Karlin* relied on Dr. Peter Uhlenberg, a professor of sociology at the University of North Carolina, to criticize and rebut Dr. Henshaw's work. Judge Crabb reviewed the work of both experts in her decision. See *Karlin*, 975 F. Supp. at 1215-18.

Judge Crabb relied on Dr. Henshaw's data and analysis to find that the Mississippi two-trip that took effect in 1992 law caused a statistically significant reduction in the rate of abortions for Mississippi residents. *Id.* at 1217. However, Judge Crabb was not convinced by the evidence offered in

that case that the reduction was caused by burdens the law imposed rather than by a possible persuasive effect. *Id.* at 1217-18. The Seventh Circuit did not disturb either finding. See 188 F.3d at 487. Thus, one way of looking at the present case is that it turns first on whether Indiana and its experts have undermined the basis for expecting the "in the presence" requirement to cause a reduction in the abortion rate, and second, if not, it turns on whether plaintiffs have come forward with sufficient evidence in this case to enable this court to reach a reliable conclusion about whether the reduction would result from persuasive effects or from burdens on women seeking abortions.

For the trial of this case, both Dr. Henshaw and Dr. Uhlenberg refined and supplemented their work. At trial the state also offered evidence from Dr. Lee Jen Wei, a professor of biostatistics at Harvard. At each step of the process, the dialogue has gone a step or two further as Dr. Henshaw and Dr. Uhlenberg (with the fresh support from Dr. Wei) have responded to criticisms from one another and from the courts.[9] This process continued even beyond the trial as the

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[9] For example, in *Karlin* Dr. Uhlenberg had criticized Dr. Henshaw's preliminary study for using some data from 1993, after the Mississippi law took effect, to make seasonal adjustments in calculating an expected rate of abortions. See *Karlin*, 975 F. Supp.. at 1216; see also *A Woman's Choice*, 904 F. Supp.. at 1456 (addressing similar criticism raised by defense witness at preliminary injunction stage of this case). That criticism was mooted by Dr. Henshaw's further work, which avoided use of the 1993 data for any seasonal adjustment. Similarly, Dr. Uhlenberg was criticized in *Karlin* for excluding from his Mississippi calculations data from July and August 1992 on the theory that some women might have accelerated their scheduling of abortions to anticipate the effective date of the law in August 1992. See *Karlin*, 975 F. Supp.. at 1216-17 (court found method "suspect for excluding both July and August"). Dr. Uhlenberg's new calculations in this court included the data from both months, mooting that earlier criticism.

court held the record open for further submissions of written evidence from Dr. Henshaw and Dr. Uhlenberg.[10]

As a result of this ongoing process of analysis, this court cannot assume that the courts' and the experts' earlier adoptions of or criticisms of Dr. Henshaw's and Dr. Uhlenberg's findings are still valid. As shown below, for example, in response to very specific criticisms of his study of Mississippi's experience, Dr. Henshaw has conducted further analyses to test those criticisms. The court now turns to the evidence concerning several states, beginning with Mississippi.

2. *Dr. Henshaw's Mississippi Studies*

After *Casey* was decided in June 1992, a similar Mississippi law took effect on August 8, 1992. The law requires a woman seeking an abortion to receive certain information in person at least 24 hours before the abortion.

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[10] The court invited further evidence from both sides because, at the close of trial, the record in this case was simply silent on one factual matter that had received considerable attention from both the district and appellate courts in *Karlin*—whether the (reported) closing of one abortion clinic in southern Mississippi in 1992 undermined the reliability of Dr. Henshaw's analysis of the Mississippi data. See *Karlin*, 188 F.3d at 487 (addressing combined effect of clinic closing and missing data from Louisiana); *Karlin*, 975 F. Supp.. at 1216. The parties submitted additional evidence after trial in the form of short supplemental depositions from Dr. Uhlenberg and Dr. Henshaw to address this factual issue and its potential effect on Dr. Henshaw's overall analysis. Dr. Uhlenberg's deposition exhibits contained an affidavit from another lawsuit in which the doctor who operated the clinic in Gulfport stated that the clinic was closed for ten months in 1992. Ex. 377 ¶ 10. There is also conflicting evidence about whether that doctor performed more abortions than were reported. See Uhlenberg Supp. Dep. 19. The net result of that additional evidence, as discussed below, shows that Dr. Henshaw's overall analysis remains valid. The same effects were observed in Mississippi when the southern counties were excluded from consideration altogether.

Dr. Henshaw and colleagues studied abortion data from Mississippi and other states to evaluate the effects of the law on women seeking abortions. The results of that study were published in the Journal of the American Medical Association in 1997. Ex. 224 ("JAMA article"). That study was more detailed, precise, and reliable than the preliminary study presented to this court in 1995 as part of the preliminary injunction proceedings. See 904 F. Supp. at 1454-55. (It also appears that the JAMA article may not have been available to the Seventh Circuit in *Karlin v. Foust*. The court's opinion in *Karlin* refers to a study of the number of abortions performed in Mississippi in the seven months before the law took effect and five months after it took effect, see 188 F.3d at 486, which was the preliminary study this court also considered. See Ex. 3.) The analysis in the JAMA article used both a time series model looking at the twelve months before and the twelve months after the law took effect, and regression analyses using data from the three years before the law took effect and the two years after. The JAMA article also introduced comparisons to Georgia and South Carolina for both the time series and the regression analyses.

The Mississippi study in the JAMA article shows that when the twelve months before and after the new Mississippi law took effect are compared: (1) the total rate of abortions for Mississippi residents (regardless of where they were obtained) decreased by approximately 16 percent; (2) the proportion of Mississippi residents traveling to other states to obtain abortions increased by approximately 37 percent; and (3) the proportion of second trimester abortions for Mississippi residents increased by approximately 40 percent. Ex. 224 at 655. (The state's expert Dr. Uhlenberg replicated these results, but criticized their reliability for reasons discussed below. See Ex. 301 ¶ 9.)

To test the significance of these changes, Dr. Henshaw and his colleagues compared the Mississippi data to data from Georgia and South Carolina, which did not impose similar changes in their abortion laws. All three states are southern states and had comparable abortion laws, apart from the law being evaluated. All three also had relatively reliable abortion data, including data from neighboring states under reciprocal agreements. Thus, the authors could account for women who left their home states to have abortions in neighboring states. See Ex. 224 at 654. The authors also noted that all three states had large non-white populations, which allowed race-specific analysis of data. *Id.*

The time series analysis showed that Mississippi residents obtained 16 percent fewer abortions in the twelve months after the law took effect as compared to the twelve months before. Abortions during that same period declined by three percent in Georgia and by five percent in South Carolina. Ex. 224 at 655 (Table 1). By comparing the changes in rates, the researchers found that the decrease in Mississippi was 14 percent as compared to Georgia and 12 percent as compared to South Carolina. The confidence intervals for the Mississippi changes as compared to the changes in the other states showed that the changes in Mississippi were statistically significant, meaning they were unlikely to have resulted from random fluctuations. *Id.*

The researchers also broke down the data for all three states by age and race. The declines in Mississippi rates were greatest for white adults and white teenagers, indicating decreases of 24 and 22 percent respectively. Ex. 224 at 656 (Table 2). The decline for non-white adults in Mississippi was smaller, and there was no decline for non-white teenagers.

The increase in second trimester abortions in Mississippi also withstood comparison to the other states. Georgia and South Carolina experienced essentially no change in the rate

of second trimester abortions. The rate in Mississippi increased by a very substantial 40 percent. The difference was statistically significant. Ex. 224 at 655 (Table 1), 657.

In addition to the comparison of rates in the twelve months before and after the Mississippi law took effect, Dr. Henshaw and his colleagues also conducted regression analyses for the abortion rates in Mississippi, South Carolina, and Georgia, using data from January 1989 through December 1994. The regression analyses showed that overall abortion rates declined between 10 and 13 percent in Mississippi after the two-trip law took effect, as compared to South Carolina and Georgia. Ex. 224 at 656 & Table 4. The decrease was statistically significant.[11] When results were broken down by age and race, the decrease in Mississippi was greater for white adults and white teenagers than for all women. Results from the regression analyses for non-whites were consistent with the results of the twelve-month

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[11] The changes were found to be statistically significant, meaning that the observed changes were highly unlikely (probability of less than 0.05) to have been the result of random fluctuations in the measured variables (*i.e.*, the "null hypothesis"). In the JAMA article, Dr. Henshaw and his colleagues measured "rate ratios" and gauged statistical significance by estimating "95 % confidence intervals" for their results. Ex. 224 at 654 and tables. In essence, if the 95% confidence interval (shown in parentheses in the tables of the JAMA article) does not include the value 1.00, then the likelihood that the null hypothesis could account for the observed results is less than 5%. See generally Federal Judicial Center, Reference Manual on Scientific Evidence 123-29 (2d ed.2000) (discussing statistical significance and confidence intervals). Defendants have not challenged directly the methods by which Dr. Henshaw and his colleagues determined statistical significance, so there is no need for the court to delve into issues concerning the proper tests of statistical significance, such as those mentioned in *Mister v. Illinois Central Gulf Railroad Co.*, 832 F.2d 1427, 1430-31 (7th Cir.1987). Of course, defendants challenge Dr. Henshaw's findings on many other grounds, which are discussed in detail below.

before/twelve- month after comparison but were not statistically significant by themselves. Ex. 224 at 656.

In the JAMA article, Dr. Henshaw and his colleagues reached the conclusion that the Mississippi two-trip law caused a statistically significant reduction in the rate of abortions for women residing in Mississippi. That conclusion is consistent with Judge Crabb's finding in *Karlin* based on the preliminary data. 975 F. Supp. at 1217.

In the JAMA article, Dr. Henshaw and his colleagues tested a number of alternative explanations for the decrease in abortion rates that they observed in Mississippi. They considered whether the decrease was part of a long-term trend of declining abortion rates in Mississippi. In fact, however, there was no such trend. Abortion rates had risen significantly in Mississippi in the years before the law took effect. Dr. Henshaw also examined data showing a two percent nationwide drop in abortion rates, which was not sufficient to account for the much larger decrease in Mississippi. See Ex. 205 ¶ 2(f). Dr. Henshaw also considered whether changes in prices or the number of providers of abortions could explain the decrease. He found no support for those explanations, *id.*, which is important in light of the reported closing of a clinic discussed in the *Karlin* opinions. He also found no significant change in the number of women of childbearing age in Mississippi. *Id.* Furthermore, by including in the JAMA article the comparison of Mississippi's experience to experience in South Carolina and Georgia, Dr. Henshaw and his colleagues also provided a further means for accounting for other trends and factors that might have affected abortion rates in Mississippi and those other states. See Ex. 224.

3. *Criticisms of Dr. Henshaw's Mississippi Studies*

Defense experts Dr. Uhlenberg and Dr. Wei both opined that the evidence did not show the Mississippi two-trip law

had any statistically significant effect on abortion rates. The court considers first Dr. Uhlenberg's criticisms and then Dr. Wei's. Consideration of the defense experts' numerous criticisms requires delving into some fairly intricate statistical and data quality issues.

Dr. Uhlenberg criticized Dr. Henshaw's Mississippi study because many out-of- state abortions for Mississippi women (especially in Louisiana) were not reported and included in the data. Ex. 301 ¶ 9. In writing the JAMA article, however, Dr. Henshaw and his colleagues made adjustments on the generous assumption that 1,000 abortions per year for Mississippi women in Louisiana were not reported to Mississippi state officials for inclusion in the data. See Ex. 224 at 654 (referencing estimate). They still found a 10 percent decrease in abortion rates for Mississippi residents attributable to the law, which was still statistically significant. Tr. at 52 (Henshaw). In the JAMA article Dr. Henshaw and his colleagues also tested the sensitivity of their conclusions to changes in out-of-state abortions. They assumed for purposes of argument that there was an increase in travel to Louisiana for abortions equal to the sum of increase in travel to Alabama and Tennessee. Under that generous assumption, the overall drop in abortion rate would be 13 percent instead of 16 percent, but still statistically significant. Ex. 224 at 657; see also Ex. 206 ¶ 24 (same).

In response to Dr. Uhlenberg's criticism, Dr. Henshaw also ran additional analyses of the data in which he excluded southern Mississippi counties. Dr. Henshaw took this approach because any missing data from Louisiana and any data problems resulting from inaccurate reports from, or the closing of, a particular clinic in southern Mississippi would have had their greatest effects on data on abortions obtained by residents of those counties. When the data Dr. Uhlenberg had criticized were excluded entirely from the analysis, Dr. Henshaw found comparable statistically significant results

for the effect of the law in the rest of the state. Henshaw Supp. Dep. 10-13, 26 & Exs. 255 & 256. Thus, the criticisms based on possible data problems from Louisiana or the accuracy of reports from the southern-most counties in Mississippi do not undermine Dr. Henshaw's conclusions.

As a further test of Dr. Henshaw's methods and conclusions, Dr. Uhlenberg tried to determine whether he could show a similar statistical effect attributable to a random month, not tied to enactment of Mississippi's two-trip law. Specifically, Dr. Uhlenberg selected June 1992 for his test, which was two months before the two-trip law took effect and in which there was an unusual one-month decrease in reported abortions in the Mississippi state data. Using Dr. Henshaw's regression calculations, Dr. Uhlenberg found a significant drop as of June 1992. Tr. 123. Dr. Uhlenberg speculated that a change in Mississippi standards for abortion clinics effective in June 1992 might have affected the number of reported abortions. *Id.*

The criticism is not persuasive. Dr. Henshaw noted that if the change of law had a significant effect in August 1992, one would also expect to detect a statistically significant effect with respect to other months close in time to August 1992. The reason is simply that, when data are compared over a significant period of time, a shift of one or two or three months may not be large enough to dilute the measured effect. See Tr. 42-43, 54 (Henshaw); Ex. 206 ¶ 27.

In addition, Dr. Uhlenberg's speculation about the effects of a change in clinic standards affecting the overall rate of reported abortions was based primarily on a legal dispute involving one abortion provider who operated a clinic in Gulfport, along the coast of the Gulf of Mexico in southern-most Mississippi. See Ex. 300 ¶¶ 22-23; Uhlenberg Supp. Dep., *passim*. Dr. Uhlenberg's reliance on that situation is not supported by the evidence.

First, Dr. Uhlenberg's information about that situation consists of conflicting affidavits from two sides in a bitter lawsuit in Mississippi. Neither Dr. Uhlenberg nor this court can make a reliable assessment of the credibility of either side's view of the facts in that case. See Uhlenberg Supp. Dep. 37 (admitting he could not tell who was telling the truth in the dispute); *id.* at 44-45 (same).

Second, and more compelling for present purposes, Dr. Henshaw analyzed the Mississippi data without taking into account the southern-most counties in Mississippi. For purposes of that analysis, he assumed Dr. Uhlenberg was right in doubting the reliability of the data from those counties. Dr. Henshaw's analysis excluding those counties again showed a substantial statistically significant decline in the rest of the state. Henshaw Supp. Dep. 10-13 and Exs. 255 & 256.

Third, Dr. Henshaw also looked more closely at Dr. Uhlenberg's hypothesis that the clinic standards law might account for a drop in the abortion rate in June 1992. Dr. Henshaw examined county-by-county reports of abortions from Mississippi for the period 1990-1993, which are in the record as Exhibits 250, 251, 252, and 253 to his supplemental deposition. Based on his review of those reports, Dr. Henshaw found two months—April 1991 and June 1992—for which there appeared anomalies best explained as reporting errors, both in DeSoto County (adjacent to Memphis, Tennessee). For the years 1990 to 1993, the reports show that residents of DeSoto County generally obtained 10 to 20 abortions per month with a few months above or below that range. The report for June 1992, however, shows zero abortions that month for residents of DeSoto County and a substantial drop in abortions for women from other states. See Ex. 252 (reporting 10 abortions in May for DeSoto County residents, zero in June,

and 17 in July; reported abortions for out-of-state residents were 180 in May, 42 in June, and 171 in July).

To account for those errors, Dr. Henshaw compared abortion numbers in June 1992 for the entire state, for the northern counties, and for the state without the northern counties, and he compared June 1992 to Junes of 1990, 1991, and 1993. The results, shown in Exhibit 257, reflect a dramatic fluctuation in the northern counties from a high of 141 abortions for residents of those counties in June 1991, down to a low of 45 in June 1992 (a 68 percent drop), and an increase to 83 in June 1993 (an 84 percent increase over 1992).[12] These problems in the data for June 1992 tend to undermine Dr. Uhlenberg's hypothesis that the change in clinic standards actually accounted for any observed reduction in the abortion rate.[13]

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[12] As this example indicates, the data from Mississippi and other states are not perfect. Experts on both sides had to make some judgment calls about anomalous data that may not have been accurate. As another example, the report for April 1991 shows 117 abortions for residents of DeSoto County, up from 23 in March 1991. Ex. 251. The same table also shows, however, a similar one-month drop in the number of out-of-state residents having abortions in Mississippi, from 191 in March 1991 to 116 in April 1991. The most reasonable explanation of that anomaly is that abortions performed in DeSoto County on women from Tennessee were reported inaccurately as abortions on residents of DeSoto County. See Henshaw Supp. Dep. 16-17.

[13] Also, additional data on changes in the stage of pregnancy when abortions were performed and the number of Mississippi women obtaining abortions out-of-state also coincide with August 1992. Those results tend to undermine Dr. Uhlenberg's hypothesis of a June 1992 effect. Exhibit 209 shows that, before August 1992, the percentage of abortions performed on Mississippi residents past eight weeks gestation was about 44 percent (on an unweighted basis). Beginning in August 1992, that percentage jumped to about 53 percent. Exhibit 210 shows that, before August 1992, the percentage of abortions that Mississippi residents obtained in other states was averaging about 19 percent (on an unweighted basis). Beginning in August 1992, the average jumped to

Even more important, however, because the data problems would give pause to any cautious researcher, Dr. Henshaw tested his regression methods and analysis if both the northern-most and the southern-most counties were excluded. He still found a substantial statistically significant drop in abortion rates resulting from the two-trip law in August 1992. He also tried excluding the data from both April 1991 and June 1992 in his calculations, in light of the reasons for doubting the accuracy of the two reports for those months. When those months were excluded entirely, Dr. Henshaw found even larger statistical effects for the two-trip law. Henshaw Supp. Dep. 23-26; Ex. 256 (Regression 2) (coefficient of absolute number of abortions changed from -91.18 to -115.68, and p-value changed from 0.0263 to 0.0046); see also Henshaw Supp. Dep. 12-13 (explaining meaning of coefficients and p-values). Thus, Dr. Henshaw ran to ground those criticisms by Dr. Uhlenberg, and he showed convincingly that they did not affect the overall reliability of his conclusions.

These additional studies are important because they are new. Not only do they address Dr. Uhlenberg's criticisms, but they address the principal problem identified by Judge Crabb and the Seventh Circuit in *Karlin v. Foust* with respect to whether the two-trip law caused abortion rates in Mississippi to decrease. The Seventh Circuit noted in its opinion that Dr. Henshaw's initial study was compromised by the combination of missing data from Louisiana and a problem resulting from either the closure of "the sole abortion facility" in southern Mississippi in early 1992 or that clinic's failure to report abortions for some period. See *Karlin*, 188 F.3d at 487 (closed); *Karlin*, 975 F. Supp. at 1216 (either closed or stopped reporting). Dr. Henshaw's

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about 25 percent. These changes as of August 1992 are consistent with the other effects of the Mississippi law that Dr. Henshaw and his colleagues observed.

further analysis here shows that even if one excludes the southern-most counties from the analysis—where the effects of missing Louisiana data and the closure of a clinic in Gulfport would obviously be greatest—the overall effect of the two-trip law in August 1992 remains substantial and statistically significant.[14]

Dr. Uhlenberg also tested Dr. Henshaw's conclusions by studying birth rates in Mississippi. If the Mississippi two-trip law had the effect of preventing abortions, one would expect to see an increase in the number of births in the state, all other things being equal. Dr. Uhlenberg found no such increase. Ex. 300, ¶¶ 14-16. Although this criticism of Dr. Henshaw's analysis has some superficial appeal, it is not persuasive. The abortion rate is much lower than the birth rate in Mississippi. See, *e.g.*, Ex. 201 at 6 (in 1992, Mississippi had 177 abortions for every 1000 live births). Thus, a 10 to 13 percent decrease in the abortion rate would be expected to produce a much smaller percentage change in the birth rate. In addition, some proportion of the pregnancies would end in miscarriages in any event, although Dr. Uhlenberg made an adjustment for that fact. Ex. 300, Table 5. Also, Dr. Uhlenberg concentrated his analysis on births to unmarried white women in Mississippi. See Ex. 301, ¶¶ 2-5. (Dr. Henshaw's data indicated the law had

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[14] Both the Seventh Circuit and Judge Crabb also pointed out that Dr. Henshaw's preliminary study of Mississippi did not take into account a possible persuasive effect of the law. That issue is considered below. The threshold issue at this stage of the analysis is whether the law in fact produced a substantial drop in the abortion rate in Mississippi. Despite the criticism based on missing Louisiana data and the clinic in Gulfport, Judge Crabb found the law had such an effect in Mississippi. Karlin, 975 F. Supp.. at 1217. The Seventh Circuit did not take issue with that finding. See Karlin, 188 F.3d at 487. In this case, however, with the evidence from Dr. Uhlenberg and Dr. Wei, Indiana has launched an attack on the threshold issue: whether the two-trip law had any effect at all in Mississippi.

stronger effects on white women than on non-white women, and abortions were much more common among unmarried women than among all women. See Ex. 201 at 22 (in 1992, 85 percent of abortions in Mississippi were performed for unmarried women). Thus, any effect on the birth rate should have been most readily observable among unmarried white women.) By looking for changes in births to unmarried white women, however, Dr. Uhlenberg did not account for the proportion of single pregnant women who marry before they give birth. The evidence indicated that the proportion would be about 29 or 30 percent. See Tr. 373. In addition, Dr. Uhlenberg developed his projected number of births from comparisons to birth rates in neighboring states that simply did not correlate well with Mississippi's birth rate at times other than those being examined and was not a reliable basis for the projection. Tr. 45-46. In fact, Exhibit 240 shows a small but noticeable increase in births among unmarried white women between 1992 and 1994.

Dr. Henshaw and his colleagues also looked at birth rates as part of their study reported in the JAMA article. Looking at the relevant time period, they observed that birth rates declined in Mississippi, South Carolina, and Georgia, but the decline was the smallest in Mississippi. The data on birth rates were inconclusive, but they were not inconsistent with the hypothesis that the Mississippi law caused an increase in the number of unintended pregnancies carried to term. See Ex. 224 at 657-58; see also *id.* at 655 (Figures 1 & 2 and Table 1).

Thus, when adjustments are made for miscarriages and for marriages before the birth of a baby, the predicted change in the birth rate is small compared to the degree of random fluctuations in birth rates. As a result, random fluctuations could easily mask such effects of changes in the abortion rate. See Ex. 206 ¶ 28. The birth data are not inconsistent with Dr. Henshaw's conclusions. The absence of a

detectable effect in the birth rate does not undermine the validity of Dr. Henshaw's finding that the Mississippi two-trip law caused a statistically significant reduction in the rate of abortions.

Dr. Uhlenberg also criticized Dr. Henshaw's conclusions because of the different results found for whites and non-whites in the Mississippi data. As noted above, Dr. Henshaw and his colleagues found greater decreases in abortion rates for whites in Mississippi. The decrease for non-white adults as shown through the regression analyses was smaller and not statistically significant by itself. There was no decrease for non-white teenagers. See Ex. 224. Dr. Uhlenberg used annual data for non-white women in Mississippi and found a slight increase in the number of abortions for that group after the Mississippi law took effect, although that result may well be an artifact of the particular time periods chosen, which used longer time periods and introduced more potentially confounding variables. See Ex. 300 ¶¶ 9-13 & Table 4. Dr. Uhlenberg found no apparent explanation for the different results by race, and he argued that this anomaly undermines Dr. Henshaw's analysis and tends to show the decrease observed by Dr. Henshaw was an artificial phenomenon rather than a true effect of the Mississippi law. See also Tr. 116.

Dr. Henshaw and his colleagues had also considered the issue of race. In the JAMA article, they wrote that the differences by race were "more difficult to interpret." Ex. 224 at 657. They suggested two possible explanations in the article, but neither is especially persuasive. It is clear, however, that there are substantial underlying differences by race with respect to both birth rates and abortion rates in Mississippi. Figure 2 of Exhibit 224 shows, for example, birth rates of 85 to 90 births per 1000 non-white women, but 58 to 62 births per 1000 white women. Figure 1 shows abortion rates of 14 to 17 abortions per 1000 non-white

women, but 8 to 11 abortions per 1000 white women. With differences that large in these underlying rates, the differences in measured effects by race do not undermine the conclusion that the law had significant effects on the overall rate of abortions.

Dr. Wei agreed with Dr. Uhlenberg on some of the criticisms discussed above. He also added some criticisms of his own and carried out some statistical analyses that persuaded him that the Mississippi data do not show a statistically significant decline in the abortion rate attributable to the two-trip law taking effect.

Dr. Wei criticized Dr. Henshaw for failing to take account of "the declining national trend in the number of abortions." Ex. 303 5. However, Dr. Henshaw's use of South Carolina and Georgia as comparator states in the JAMA article provided a reasonable means for accounting for such changes. See Ex. 224 at 656-58. In addition, Mississippi had experienced increases in its relatively low abortion rate while the national average rate was declining slightly. The modest downward national trend does not undermine Dr. Henshaw's conclusions.

Dr. Wei also criticized Dr. Henshaw for failing to account for changing beliefs regarding abortion. See Ex. 303 ¶ 5. Again, however, the use of comparator states provided a mechanism for accounting for such changes (if they had actually occurred) on a national or regional level. Moreover, Dr. Wei and the defendants have not come forward with any actual evidence of such changes at any relevant times. It is always possible to imagine other possible confounding factors. Without some reason to believe the factors are real, the mere possibility does not undermine Dr. Henshaw's results.

Dr. Wei also cited an article by Meier and others that he described as providing "scientific evidence that state-level

restrictions have no effect on the incidence of abortion." Ex. 303 ¶ 6, citing Meier, *et al.*, *The Impact of State-Level Restrictions on Abortion*, 1996 Demography 307. Dr. Wei seriously overstated the conclusions of that article, which is in the record as Exhibit 328. The Meier paper studied 23 separate state policy actions in the wake of *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). The authors found no evidence that the policies they studied had an appreciable impact on abortion rates. Ex. 328 at 311. The authors recognized, however, as Dr. Wei did not, that their findings did "not refute the possibility that state policies can affect the rate of induced abortions." *Id.* They also recognized that state Medicaid policies affect abortion rates. The authors did not purport to have come forward with "scientific evidence that state-level restrictions have no effect on the incidence of abortion," without qualification.

Even more relevant for this case, Meier and his colleagues also recognized the importance of the *Casey* decision. They cited "early anecdotal or case analysis" suggesting that the waiting period and mandatory disclosure laws have an effect. *Id.* The authors also suggested more systematic study of the effects of such laws as later data became available. *Id.* Dr. Henshaw's JAMA article is precisely such an effort, and it provides substantial proof of such effects.

Dr. Wei also identified a number of additional possible confounding and intervening variables, including changes in abortion pricing, levels of anti- abortion activity "perceived as harassment" at clinics, negative publicity, the quality of services, changed service availability, the reputation of providers, the scope and funding of abstinence programs, the scope and availability of services providing alternatives to abortion, differences in geographic proximity of abortion services, misreporting and underreporting of abortion data,

changing laws on abortion facilities, changes in Medicaid financing for abortion, and alterations in reimbursement for abortions by private insurance carriers. Ex. 303 ¶ 7. Dr. Wei claimed: "None of these were accounted for by Dr. Henshaw in examining the impact of Mississippi's waiting period and informed consent law."

Plaintiffs have objected to Dr. Wei's testimony on these points, arguing that he is not qualified to offer an admissible expert opinion on the topic of potential confounding factors affecting studies of abortion rates. Dr. Wei had not studied abortion rates or the subject of abortion more generally before he began working on this case. However, he is experienced in statistical analysis in a wide range of areas relating to human health and medical practice. He testified that when he begins to do statistical work in a new field (independent of litigation work, which is a small part of his work), he immerses himself in the literature of the field to help him get a feel for what sorts of factors are most likely to affect and possibly to obscure the data. The court credits that testimony and overrules plaintiffs' objections to Dr. Wei's testimony on that score. Plaintiffs' criticism goes to the weight of his testimony, not its admissibility. However, Dr. Wei's testimony on potential confounding factors is entitled to little weight.

Dr. Wei's criticism of Dr. Henshaw for failing to account for potential confounding factors simply is not accurate. As noted above, Dr. Henshaw and his colleagues considered many of these factors, and they used methods designed to minimize and control for such effects. For example, they considered changes in prices, changes in the number of providers, and changes in the population of women of child-bearing age. They found no significant changes in these factors. In addition, they used comparisons to Georgia and South Carolina, which share important similarities with Mississippi, as a useful control for other factors, including

those that might have affected abortion rates more broadly. As for the other potential confounding factors identified by Dr. Wei, there is simply no evidence that any of these factors changed in Mississippi during the time period studied by Dr. Henshaw.

Dr. Henshaw and his colleagues made a reasonable and serious effort to account for likely confounding variables. Their effort was easily sufficient to render their analysis relevant and admissible. See generally *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility."); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 422-28 (7th Cir.2000) (reversing district court finding that statistical reports were inadmissible). It is almost always possible for someone disappointed with the results of statistical analysis to hypothesize one more independent variable that might explain the results. Such a bare hypothesis is not sufficient to undermine the analysis. See *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir.1989) (defendant's "attack on the plaintiffs' statistical case amounts to a contention that unless a plaintiff eliminates all alternative hypotheses he must lose. That would raise the threshold of proof too high."). Dr. Wei and the defense have had ample time and incentive to find evidence that any other material changes occurred during the relevant time period in Mississippi. They have not come forward with such evidence. *Cf. Mister v. Illinois Central Gulf Railroad Co.*, 832 F.2d 1427, 1431-33 (7th Cir.1987) (noting importance of taking relevant variables into account, but plaintiffs proved discrimination where employer failed to conduct appropriate analysis to support its theory that distance from work sites explained apparent racial bias in hiring data). While the proponent of the analysis must make reasonable efforts to account for relevant explanatory variables, he need not anticipate and refute every hypothesis the opponent might dream up. Unsupported speculation

about other possible confounding variables is not a sufficient basis for discounting the significance of Dr. Henshaw's analysis.

Dr. Wei himself wrote that an "examination of the above variables is warranted." Ex. 303 ¶ 8. If such an examination was warranted, Dr. Wei and the defense did not carry out such an examination, beyond those items raised by Dr. Uhlenberg and addressed above. Moreover, Dr. Wei's own statistical analyses were carried out in a way that introduced several genuine confounding factors. He failed to follow his own advice to take them into account.

Dr. Wei criticized Dr. Henshaw for using the twelve months preceding the two-trip law in Mississippi because "the number of abortions in 1991 was extremely high," leading Dr. Wei to describe 1991 as an "outlier year" not appropriate for comparison. The number of abortions in Mississippi in 1991 showed a 10.7 percent increase over 1990. Ex. 303, Table 3. However, there is evidence that a new abortion clinic opened in southern Mississippi in 1991, see Ex. 206 ¶ 20, which is precisely the sort of potential confounding factor that all three experts recognize should be taken into account (and a factor that Dr. Henshaw addressed in detail in his supplemental deposition). In addition, the trend over several years in Mississippi had been a significant increase in abortion rates, which had started out and remained well below the national average. See Ex. 201 at 3, 6 (national abortion rate of 23 to 24 per 1000 women aged 15-44, while Mississippi rate was only 12 per 1000 women aged 15-44 in 1992). Given the combined effect of that long-term trend and the change in provider availability in southern Mississippi in 1991, Dr. Wei's criticism of Dr. Henshaw for focusing on the twelve months before and after the effective date of the law is not persuasive.

In addition, there are substantial reasons for examining a fairly short period of time for purposes of the comparison.

As Dr. Wei acknowledged, there are many potential confounding variables in this analysis, including long-term trends and changes in abortion providers and availability. The longer the period that is examined, the greater potential there is for such confounding effects, as indicated, for example, by the change in providers in 1991.

Dr. Wei also criticized Dr. Henshaw for failing to attempt a survey of affected women to assess the impact of the law. He said this failure rendered Dr. Henshaw's conclusions "speculative at best." This criticism is naive and completely unfounded. Dr. Henshaw, who is thoroughly acquainted with the challenges of doing research related to abortion and abortion policy, explained for the record the obvious practical and ethical problems involved in doing the type of survey Dr. Wei proposed. These problems include confidentiality issues and the difficulty in even finding women who might have contacted a clinic anonymously, learned of the requirements, and changed their minds, let alone the difficulty in obtaining reliable answers from a woman after the birth of a child about why she might have chosen not to have an abortion early in the pregnancy. See Tr. 362-64 (Henshaw); see also Tr. 282 (Wei acknowledging "logistical problems" and recognizing that such a survey would be "very difficult"); Tr. 309 (Wei acknowledging there are areas of social science research where true experiments with human subjects would be unethical).

Dr. Wei carried out his own analysis of data from Mississippi. In his principal analysis, he compared monthly abortion rates from August 1992 to December 1992 with the same months from 1988, 1989, 1990, and 1991. That is, he compared August 1992 to the Augusts of the four previous years, September 1992 to the Septembers of the four previous years, and so on for Octobers, Novembers, and Decembers. Using these comparisons, he found no statistically significant

decrease in abortion rates for 1992 after the two-trip law took effect.

Dr. Wei's use of the Wei-Johnson method for analyzing time-series data may be useful in many situations, but its use as applied to the Mississippi data is not persuasive. Most important, Dr. Wei's method suffers from the very flaws for which he incorrectly criticized Dr. Henshaw—the failure to account for other confounding variables, especially long-term trends in Mississippi and changes in provider availability. See Tr. 376 (Henshaw criticism of Wei-Johnson method as applied). Also, by comparing only monthly data, which involve quite a bit of random fluctuation at the statewide level, Dr. Wei reduced his sample sizes and introduced more potential for "noise" in the statistical results. See Tr. 376. If the Mississippi two-trip law did have a significant effect on abortion rates when it took effect in August 1992, Dr. Wei's methods were custom-tailored to hide that effect in statistical noise created by both the long-term trends and the greater degree of fluctuation from month to month than is present from year to year.

Although Dr. Wei brought impressive credentials to this case, some of his testimony further diminished his credibility in general and more specifically with respect to his reliance on his Wei-Johnson method in this case. For example, in defending his approach to time-series data, Dr. Wei used a comparison to the stock market. He asserted that it would be easier for him to predict the price of IBM stock next year than to predict the abortion rate in Mississippi next year, supposedly because he had more data points over the years for the IBM stock price. Tr. 287; see also Tr. 356-57. With all due respect to Dr. Wei, the court cannot credit that testimony, and it impaired his credibility overall.[15]

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[15] For example, one recent published report of IBM stock price as of February 10, 2001, showed a 52-week high of $134.94 and a 52-week

More directly pertinent, Dr. Wei also impaired his credibility by signing and submitting an affidavit that exaggerated and misstated his conclusions. In Paragraph 2 of his report, Dr. Wei stated under oath:

> For the reasons enumerated below, I believe that Senate Bill 311 is unlikely to cause any unusual delay to Indiana women in obtaining abortions resulting in an increase in second trimester terminations, unlikely to prevent women from obtaining the abortions they desire, unlikely to expose them to any unusual adverse health risks, and unlikely to especially harm low-income women.

Ex. 303 ¶ 2. That strong form of his conclusions—not only that Dr. Henshaw had not proven his own conclusions, but that in fact the contrary was true and the law is unlikely to have adverse effects for women—is not supported by Dr. Wei's own testimony or his explanations directed toward the Mississippi data. In Paragraph 8, for example, Dr. Wei said he could "neither verify Dr. Henshaw's conclusions nor rule out changes in Mississippi's abortion rate due to possible other factors identified above." At trial, however, during questioning by the court about the contrast between these two views, Dr. Wei backed away from the strong assertions of Paragraph 2 and conceded that he could not say the law would have no impact. Tr. 353-54.

Dr. Wei also evaluated how the Mississippi and Utah two-trip laws affected the timing of abortions in those states. He found small increases in the annual means for the week of gestation for abortions in those states. See Ex. 303 ¶ 20 & Figure 9 (also including Louisiana, which did not show a

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low of $80.06. Even if one assumed the Mississippi rate of abortion had purely random swings on an annual basis of 10 to 13 percent (the magnitude of the effect Dr. Henshaw observed), anyone who finds it easier to predict a stock price based on past data than to predict a statewide abortion rate should be very wealthy.

change from its already higher level). He found increases that he described as "clinically insignificant." This comment again shows Dr. Wei's lack of familiarity with the relevant considerations in dealing with abortions. The change in the mean week of gestation is not the clinically relevant consideration. What is clinically most significant is the shift of an abortion from late in the first trimester to early in the second trimester, when the procedure becomes more expensive and more complex, and carries higher medical risks. That is what Dr. Henshaw considered, and Dr. Wei did not challenge those results.

Dr. Wei also looked at abortion complication rates, which were available for Mississippi and Utah. He found no significant differences. Ex. 303 ¶ 21 & Table 2. However, the sample sizes were so small as to render the comparison meaningless. An abortion complication rate of 0.0013 in Mississippi in 1990-91 amounts to eight to ten such cases per year in the state. An abortion complication rate of 0.0015 in Utah in 1994 and 1995 amounts to only four or five such cases per year in that state. See Ex. 202; Ex. 300, Table 3 (annual number of abortions in Utah); Ex. 303, Table 3 (annual number of abortions in Mississippi).

In sum, Dr. Uhlenberg's and Dr. Wei's criticisms of Dr. Henshaw's Mississippi studies did not undermine the strength of Dr. Henshaw's conclusions about the effects of the Mississippi two-trip law.

4. *The Utah and Louisiana Experiences*

Dr. Uhlenberg questioned Dr. Henshaw's conclusions about the Mississippi data because Dr. Uhlenberg looked at data from both Utah and Louisiana before and after those states adopted similar mandatory disclosure and waiting period laws that require two trips to a clinic. Dr. Uhlenberg found no significant decline in abortions in either state, let alone declines that could be attributed to enforcement of the

new laws. The absence of such effects in those states, Dr. Uhlenberg opined, suggested that Dr. Henshaw's finding of an effect in Mississippi was spurious. The parties presented extensive evidence on Utah and somewhat less on Louisiana.

The Utah law took effect in 1996 and requires an in-person visit with an abortion provider or a referring physician 24 hours before the abortion takes place. The law thus has essentially the same practical two-trip requirement as the Indiana law's "in the presence" requirement. Dr. Uhlenberg considered data from both before and after the Utah law took effect. The law took effect in mid-1996, and Dr. Uhlenberg had only annual data, not monthly data, so he compared annual totals for 1995 and 1997. He found "no unusual decline in the number of abortions to residents of Utah in the period following the implementation of the law in Utah." Ex. 300 ¶ 6. Dr. Uhlenberg found a decline of 4.9 percent from 1995 to 1997, which amounted to an annual decline that he said was "about the same as the annual percent decline in abortions in the U.S. in recent years." *Id.*, ¶ 7(a). Dr. Uhlenberg also found no significant change in the proportion of abortions occurring in the first trimester. *Id.*, ¶ 7(b), and Table 3. Dr. Uhlenberg viewed the Utah data as weighing against Dr. Henshaw's opinions on the likely effects of such "two-trip" laws.

On closer examination, however, the Utah experience tends to support plaintiffs. It certainly does not support the defendants. The principal reason is that Utah's population has been growing rapidly. In evaluating the likely effects of a two-trip requirement, therefore, the absolute number of abortions is not as probative as the *rate* of abortions among women of child- bearing age. Adjusting for the population increase, the rate of abortions per 1000 women aged 15-44 for abortions performed in Utah on Utah residents *declined* by 9.3 percent from 1995 to 1997, the period that Dr. Uhlenberg studied. See Ex. 206 ¶ 13; Tr. 37 (Henshaw).

That change was statistically significant. The probability of a chance fluctuation of that magnitude was less than .001. In addition, from 1995 to 1997, there also was a 33 percent decrease in the number of women coming from other states to Utah to obtain abortions. Ex. 206 16. That change is also consistent with the experience in Mississippi, where there was a similarly dramatic decrease (approximately 30 percent) in the number of women coming from other states after the two-trip law took effect. Ex. 205 ¶ 2(e). [16]

At trial, Dr. Uhlenberg objected to Dr. Henshaw's reliance on abortion rates in Utah because that approach did not take into account the age-distribution of women of child-bearing age. See Tr. 187-91. For example, if the growth in population were skewed more heavily toward older women in the range, who have relatively few abortions, the results would be less meaningful.

Dr. Uhlenberg's attack on Dr. Henshaw's treatment of the Utah data is not persuasive. It was yet another example of the defense raising an objection or criticism without appropriate follow-through. Cf. *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir.1989) (discounting defense criticism of plaintiffs' statistical evidence when not supported by appropriate test of the criticism); *Mister v. Illinois Central Gulf Railroad Co.*, 832 F.2d 1427, 1432-33 (7th Cir.1987) (discounting defense hypothesis for statistical evidence where defense did not actually test the hypothesis with available data). First, Dr. Uhlenberg's rebuttal did nothing to justify his own reliance on absolute numbers without taking any account of the change in population. Second, Dr. Uhlenberg did not attempt himself the sort of age-

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[16] Less information was available with respect to Utah residents traveling to other states to obtain abortions, apparently as a result of the lack of effective reciprocal reporting agreements. See Tr. 38 (Henshaw) ("I have no data on Utah residents that went to some of the neighboring states.").

normalization test that he said would provide the best test. Third, in response to Dr. Uhlenberg's criticism, Dr. Henshaw actually did check the age distribution of the growth in Utah population. He found no disproportionate increase among older women, and he found a significant increase in population among younger women, who tend to have more abortions. Tr. 384-85.

The Utah data are not as detailed as those from Mississippi, but when the proper adjustment is made for the growth of the population, the Utah data are consistent with Dr. Henshaw's findings with respect to Mississippi. The two-trip requirement is associated with a statistically significant and substantial decrease in the abortion rate. It is also associated with a sharp drop in the number of women coming to Utah from other states to have abortions.[17]

Dr. Uhlenberg also studied data from Louisiana, which imposed a two-trip requirement that took effect September 25, 1995. Dr. Uhlenberg found no discernible effect on the abortion rate in Louisiana. Using data from the Louisiana state government, Dr. Uhlenberg found slight declines in the numbers of abortions performed when comparing the twelve months before the law took effect to the twelve months afterwards (1.3 percent decline), and when comparing 1994 to 1996 (2.3 percent decline). Ex. 300 ¶ 3. Dr. Uhlenberg did similar comparisons using data from the Alan Guttmacher Institute (AGI). Those data showed an increase of 8.4 percent in the number of abortions in 1996, after the law took effect, as compared to 1992. Ex. 300 ¶ 4. At first glance, those data support defendants' view.

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[17] The percentage of abortions performed in the second trimester in Utah increased from 7.5 percent in 1995 to 8.4 percent in 1996. Dr. Henshaw described that change as a 12 percent increase in the incidence of such abortions, but he described the change, which involved quite small numbers, as only "non-trivial," not as statistically significant. See Ex. 206 ¶ 15; Tr. 37 (Henshaw); Ex. 300 ¶ 7(b).

Dr. Henshaw testified that Louisiana data on abortions are not reliable enough to measure accurately a law that would have the effect of reducing abortion rates by 10 percent. Tr. 36. The unreliability is shown by substantial differences between the results of AGI surveys of abortion providers in Louisiana and the state's own data, which generally reflect a lower number of abortions. See Ex. 206 ¶ 4 & Table 1 (AGI survey of providers found abortion numbers 22 and 20 percent higher than official state data in 1995 and 1996); see also Ex. 300, Tables 1 & 2 (data used by Dr. Uhlenberg). Those large differences are strong indications that the statewide totals for Louisiana simply are not reliable enough to detect changes on the order of 10 or 15 percent. Also, the AGI data were not available for Louisiana for 1993 and 1994, the last two full years before the law took effect. The evidence from Louisiana does not undermine Dr. Henshaw's conclusions.

5. *The Statistical Evidence Shows Significant Effects on Abortion Rates, Interstate Travel for Abortions, and Delays of Abortions*

After considering the statistical evidence submitted by both sides, the court finds that the Mississippi two-trip law: (a) caused a decrease in the abortion rate for Mississippi residents of approximately 10 to 13 percent, (b) caused a significant increase in the number of Mississippi residents who traveled to other states to obtain abortions, (c) caused a significant decrease in the number of residents of other states who traveled to Mississippi to obtain abortions, and (d) caused women to delay having abortions, resulting in a significant increase in the number and rate of second trimester abortions for Mississippi residents, which are more dangerous and more expensive. Those findings are generally consistent with the preliminary data from Utah, when properly focused on abortion rates, although the Utah data on travel are less complete and reliable. The different results

from Louisiana do not undermine those conclusions, in the court's view, because the statewide data from Louisiana are not reliably precise enough to support conclusions either way.

The next question is whether those results in Mississippi provide a reasonable basis for predicting estimated results in Indiana. The court finds that they do provide such a reasonable basis. There is no reason on this record to expect the experience to be significantly different. In the JAMA article, Dr. Henshaw and his colleagues suggested that the large decline in abortion rates they observed in Mississippi might not occur in states with greater availability of abortion providers both within the state and among neighboring states. Ex. 224 at 658. Indiana has a larger population and a larger number of abortion clinics, so that overall, clinics are more conveniently available to women in Indiana than to women in Mississippi. See Exs. 305-316. However, the Mississippi results did not correlate at all with distance or geography, see Tr. 64-65, which indicates that something other than a change in mere convenience is at work here.

Dr. Henshaw found the effects of the two-trip law were greater for white women in Mississippi than for non-white women. The available data for Indiana, from 1995, show that 71.7 percent of abortions performed in Indiana were for women identified as white and 23.7 percent for women identified as black. Ex. 203 at 56. In Mississippi, by comparison, 36.1 percent of abortions were for women identified as white and 62.8 percent for women identified as black. Perhaps that difference could weigh in favor of a greater impact in Indiana, but one cannot say with any reasonable certainty that such a greater effect is likely. See Tr. 34 (Henshaw noting possibility but not opining as to likelihood). The higher proportion of white population in Indiana might or might not tend to produce a greater effect, but there is no reason to expect a smaller effect.

Dr. Henshaw found, contrary to his expectations, that the observed decrease in the abortion rate could not be correlated to distance or economic status. The defendants have argued that that evidence undermines his theory of causation. The court does not view the evidence that way. First, when dealing with expert witnesses in litigation, credible testimony that the expert did not find what he expected to find is a breath of fresh air. In addition, plaintiffs in this case need to show an undue burden. They do not need to show definitively the precise mechanism by which such an undue burden would result from the law.[18]

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[18] The absence of correlation with distance or economic status suggests that the effects of the two trip law may be more closely tied to the same considerations and types of relationships the Supreme Court considered when it struck down Pennsylvania's spousal notice law in *Casey*. Plaintiffs in this case provided substantial evidence about behavior of men and women in abusive relationships. Dr. Connie L. Best is a psychologist with expertise in domestic violence. She provided an affidavit at the preliminary injunction phase of the case in which she testified that men who subject women to violence and abuse often subject them to surveillance and use other tactics to keep them under control. Best Aff. ¶ 10-19, 36-49 (Ex. 3 to Pls. Motion for Prelim. Inj.). She also testified that men who abuse their wives or partners often escalate the abuse when the woman becomes pregnant. Such behavior makes it very difficult for some abused women to make even one trip to an abortion clinic, let alone two. The result of the two-trip requirement may be that the man learns of the woman's plan to have an abortion. Best. Aff. ¶ 37-45.

Dr. Best's affidavit does not show by itself that the two-trip requirement in Indiana will in fact impose an undue burden on a significant number of women, but it provides a reasonable explanation for how a two-trip requirement could prevent a significant number of women from exercising their right to choose to have an abortion. Moreover, that real possibility in many cases is one of the principal foundations for the Supreme Court's decision in *Casey* to strike down the spousal notification law. See 505 U.S. at 888-95, 112 S. Ct. 2791 (detailing evidence of domestic violence and effects on women's practical ability to choose to have abortions). As the Supreme Court explained:

For the reasons set forth above, the court finds that the effects of Indiana's "in the presence" requirement are likely to be equivalent to the effects of the similar law in Mississippi—an abortion rate reduced by 10 to 13 percent, a significant increase in the proportion of second trimester abortions, a significant increase in the number of Indiana residents traveling to other states to have abortions, and a significant decrease in the number of residents of other states traveling to Indiana to have abortions.

B. *"Persuasive Effect" v. Burdens*

The finding that the Indiana law is likely to cause a significant decrease in the abortion rate does not show, by itself, that the law will impose an undue burden. From that starting point, the critical issue is whether such a decrease is likely to be caused by burdens the law imposes on women seeking an abortion or by persuasive effects that the state-mandated information and the waiting period might have in causing women to choose not to have abortions. That was the

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> For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in [*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976)]. The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

Id. at 897, 112 S. Ct. 2791. The practical effect of a two-trip law for some women is likely to be the same as the effect of a spousal notice law—disclosure to a spouse or partner that the woman seeks to have an abortion, followed by additional abuse or other efforts to prevent the abortion.

pivotal issue in *Karlin* on which plaintiffs' case failed. See 188 F.3d at 487-88 ("most significant shortcoming" in Mississippi study was failure to control for persuasive effect); 975 F. Supp. at 1217-18 (plaintiffs failed to show absence of persuasive effect). Such a law was upheld in *Casey* because a legislature may require that information that is truthful and not misleading be provided to better inform a woman's choice, and possibly to persuade her not to have an abortion she would otherwise choose to have. See 505 U.S. at 885, 112 S. Ct. 2791.

Based on the evidence in this case, the court finds that the likely effects of the Indiana "in the presence" requirement will not result from any such persuasive (and thus constitutional) effect. The effects will instead result from the substantial obstacles the law creates for a substantial fraction of women who seek to have abortions.

At the closing argument in this case, the court asked counsel for defendants to direct the court's attention to any evidence tending to show that a mandatory disclosure/informed consent law with a waiting period has a persuasive effect—*i.e.*, that the information and the time to consider it persuade women to change their minds about whether to have an abortion. The state's response was that testimony from a witness from Planned Parenthood showed that giving the information over the telephone caused an increase in the "show rate" for his organization's clinics, thus indicating the startling result that the state-mandated information tends to persuade women to have *more* abortions than they otherwise would. See Tr. 50-52 (May 19, 2000), citing Tr. 12-14. Counsel observed: "That's the only persuasive effect that we've seen demonstrated by either side in the record." Tr. 50 (May 19, 2000).

The court agrees with that candid observation. After years of litigation, with ample opportunity and incentive for defendants to come forward with such evidence, there is

simply no evidence in this record tending to demonstrate that mandatory disclosure/informed consent and waiting period laws can accomplish the persuasive purpose deemed constitutional in *Casey*.

The court does not mean to suggest that the burden of proof on this issue is on defendants. Plaintiffs have come forward with evidence from several sources tending to show the absence of any persuasive effect from the information that is provided. That evidence has not been rebutted.

In roughly chronological order, plaintiffs offered evidence at the preliminary injunction stage about the experience in North Dakota, where a mandatory disclosure/waiting period law took effect in 1994. The North Dakota law allowed the information to be provided by telephone, so only one trip was required. The director of the only clinic in North Dakota testified that only one or two percent of women who are given the mandated information over the telephone ask for copies of written materials that must be offered. Pr. Inj. Tr. 268. She testified that no patient had ever told her she was cancelling an appointment because of the information. *Id.* at 269. In addition, she saw no decrease in the number of abortions provided. *Id.* at 269-70; see also Ex. 29 (summary statistics). If the state-mandated information and waiting period had any persuasive effect, then one might reasonably expect data from North Dakota to show a sign of it. There is no such sign.[19]

In Indiana itself, the mandatory disclosure and waiting period law took effect in November 1997, subject to the proviso that the information could be provided by telephone. See *A Woman's Choice*, 980 F. Supp. at 974-75. Plaintiffs in this case then established procedures and mechanisms for

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[19] At the preliminary injunction phase of the case, defendants criticized the North Dakota data as "crude." The court invited further analysis, see *A Woman's Choice*, 904 F. Supp.. at 1458 n. 17, but none was provided.

that information to be provided to a woman who has scheduled an appointment for an abortion. The evidence at trial in this case indicates no change in the so-called "show rate," the proportion of women who schedule appointments who actually come to the clinics as scheduled. See Ex. 226. Overall abortion numbers for Planned Parenthood of Central and Southern Indiana increased after the law became effective, notwithstanding a $25 price increase. Ex. 227; see also Tr. 13-14. Again, if the state-mandated information and waiting period were having any persuasive effect on those women who receive it, one might reasonably expect the Indiana data to show a sign of it. And again, there is no such sign.

In addition, the evidence that a two-trip law is likely to increase the number of women from such a state who travel across state lines to obtain an abortion tends to weigh against any persuasive effect. Dr. Henshaw found that the proportion of Mississippi residents who traveled to other states to obtain abortions increased by about 37 percent. Ex. 224 at 655. (For purposes of comparison, the same proportion for South Carolina women dropped slightly. See *id.* The change in Mississippi was statistically significant.) For a significant proportion of women, a two-trip law makes one trip to a clinic in another state a better choice than two trips to a clinic in their home state. That phenomenon cannot be attributed to any persuasive effect. There is no indication that mandatory disclosure and waiting period laws that require only one trip to a clinic produce similar increases in out-of-state abortions.

Other evidence on changes in interstate travel for abortions also tends to show the absence of a persuasive effect. After the two-trip law took effect, the number of women from other states traveling to Mississippi for abortions decreased by about 30 percent. The data from Utah showed a similar decrease of 33 percent in travel from other

states to Utah for abortions. Those changes are statistically significant, they are attributable to the laws taking effect, and they have not been explained by any hypothesis other than the burdens of the two-trip requirements. That evidence also tends to show that the effects of the law in reducing overall abortion rates cannot be attributed to persuasion.[20]

It is of course always possible to generate one more hypothesis or to conduct one more study. The court therefore cannot say it would be impossible for the Indiana law to have a persuasive effect. At the time of trial in this case, however, the legal importance of such an effect and the potential value of evidence of such an effect had been part of this case for four years. The state and its experts have had ample opportunity to look for such evidence in several states where waiting period and mandatory disclosure laws have been in effect. They have not found and offered any such evidence. The absence of such evidence is a powerful indicator that those laws do not have a persuasive effect.[21]

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[20] The evidence of changes in interstate travel patterns also suggests that the observed changes in abortion rates in Mississippi and Utah do not fully reflect the burdens that two-trip laws would impose if enacted by several adjacent states. When neighboring states do not require two trips, residents of a state with a two-trip law may choose to avoid some burdens of the law by crossing a state line. In other areas of constitutional law, however, the courts evaluate the effects of a state law based on the assumption that many or all other states may enact similar laws. See, *e.g.*, *Healy v. The Beer Institute*, 491 U.S. 324, 336-37, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989); *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984).

[21] The court is not relying on Dr. Henshaw's report of conversations with two clinic directors in Mississippi as support for the finding that the law's effects are the result of burdens rather than persuasion. That reliance has been the subject of considerable debate in this case. See 904 F. Supp.. at 1458-62. There is ample support for Dr. Henshaw's opinion on this point apart from those conversations.

In *Karlin v. Foust*, the Seventh Circuit observed that "every post-*Casey* facial challenge to a waiting period requirement substantially similar to the one upheld in *Casey* has been found constitutional." 188 F.3d at 486. In support, the court cited two decisions upholding North Dakota and South Dakota laws, but neither law required two trips to a clinic. See *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir.1995); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir.1994). The Seventh Circuit also cited in *Karlin* the Fifth Circuit's decision in *Barnes*, 970 F.2d at 15, which upheld the Mississippi two-trip requirement before the state had experienced its effects (which were studied in this case). The Seventh Circuit also cited a district court decision in Utah that was reversed on other grounds. See *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1494 (D.Utah 1994), *rev'd in part on other grounds*, 75 F.3d 564 (10th Cir.1995). The Utah district court decision offers little guidance on this issue at this time. The Utah law was actually construed to require only one trip, so that information could be provided by telephone. See 844 F. Supp. at 1487, 1495. The district judge offered the correct observation that the Supreme Court had upheld a two-trip requirement in *Casey*, but there is no indication that the court considered evidence of actual experience under a two-trip law, which provides the type of evidentiary foundation that *Casey* recognized could be used to challenge such a law. See 844 F. Supp. at 1487-88, 1490. Further, the district court decision was not reviewed on the merits.[22]

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[22] On appeal, the Tenth Circuit dismissed as untimely the appeal on the merits, but remanded the district court's award of fees against the plaintiffs. 75 F.3d 564. After the district court again imposed fees after that remand, the Tenth Circuit conclusively reversed the fee award. 136 F.3d 707 (10th Cir.1998). After the district court construed the Utah law in 1994 as requiring only one trip to a clinic, the law was amended to

Thus, *Karlin* remains the only post-*Casey* decision upholding a two-trip requirement where the challenge was based on evidence of women's actual experience under a two-trip law. The evidence in this case and in *Karlin* shows that such laws are likely to cause statistically significant reductions in the rate of abortions, on the order of approximately 10 percent or a little more, allowing for variations among different states. See 975 F. Supp. at 1217 (finding as a fact that law caused reduction in abortion rate). The additional evidence in this case, not offered in *Karlin*, goes further to show that the reduction in the rate of abortions and the other important effects of the law (delays in abortions and changes in interstate travel) are not at all likely to result from any persuasive effect the mandated information and waiting period might have.

The evidence in this case also goes well beyond what was found sufficient in *Casey* to show that a spousal notification requirement would impose undue burdens on some women's right to choose to end their pregnancies. The reasonable conclusion from this evidence, then, is that Indiana's "in the presence" requirement would impose a substantial obstacle for a sizable number of women who seek abortions. The effect of the requirement would impose an undue burden on their constitutional right to choose to end a pregnancy.

V. *The "Purpose" Prong of the Undue Burden Test*

The Supreme Court taught in *Casey* that a law imposes an undue burden on a woman's right to choose if it was enacted for the purpose of placing a substantial obstacle in the path of a woman seeking an abortion. 505 U.S. at 877, 112 S. Ct. 2791. Plaintiffs contend that the "in the presence"

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require the advance information to be provided "in a face-to- face consultation." The enforcement of that amendment beginning in 1996 was the change studied by Dr. Henshaw and Dr. Uhlenberg in the discussion of Utah data in Part IV-A-4, above.

requirement of Public Law 187 has no legitimate purpose and was enacted to place a substantial burden on a woman's right to choose. Defendants argue that the Indiana legislature reasonably could have concluded that "sound medical practice" required a medical professional to assess fetal age and the risks of the abortion procedure in person. Def. Post-trial Br. at 18-19.

During the legislative session leading to enactment of Public Law 187, the Indiana legislature preserved an unusually detailed history of the legislative process, including audio tapes of the House floor debates, relevant portions of which were transcribed for the record. As introduced and passed by the Indiana Senate, the legislation required only that the mandatory disclosure be made "orally" to the pregnant woman. The language requiring that information be provided "in the presence of the pregnant woman" was added by a floor amendment in the Indiana House of Representatives. Debate on the amendment was brief. Initially, the sponsor of the amendment explained the result of the words he proposed but not his underlying reasons for requiring the information session to be conducted in person:

> [A]ll my amendment does is on page 2, line 22, after the word "abortion" it inserts "and in the presence of the pregnant woman" so it's very clear that the information will be given to the pregnant woman in person and not by telephone. That information can be given to her by her family doctor or by the clinic. It just simply requires that it be given in person and I would appreciate your support. I might add, Mr. Speaker, there's some confusion about the language that presently is in the bill whether the information can be given over the telephone or not and this would clear that up and make it very clear that it should be, it will be given in the presence of the woman and not by telephone or some other conveyance.

Ex. 38 at 3. Then a member spoke in opposition to the amendment and raised some of the same objections that plaintiffs have raised here:

> Some people have referred to the bill itself as the women—women are stupid bill. This amendment is the women are really stupid amendment and I don't mean that as offensively to [the sponsor of the amendment]. I really feel that very sincerely. Because now we're saying that not only do we have to have this informed consent as if a woman hasn't thought this through, we're saying that if she calls in and talks to the physician and hears all the options and is given the option of seeing the pictures that people want her to see or the information that she has to receive, that she's not capable of understanding that over the telephone. This is clearly an effort to make the woman have to go into the clinic, to have to go through all the protesters, and to alert those protesters that she'll be back in 18 hours, we'll know exactly who she is, we'll know exactly why she's back, it gives them the second chance. I mean if we can have informed consent, we can have the bill as it is now with the language in it that requires the informed consent, that requires her to have to call in and get that, all the information and all the graphic descriptions that you want to give, if that's what you so choose, but we don't have to have her go into the facility twice in order to receive that information. I would ask that you reject this amendment.

Id. at 3-4. Another member spoke in opposition:

> I've had a test, biopsy if you will, for cancer and if you can get that information on the phone when something is life threatening as cancer, I should think if you choose to, you could get any other information on the phone as far as abortion or not to have an abortion or whatever is concerned.

Id. at 4.

After the opponents asserted that the "in the presence" requirement was intended as an "obstacle," the chief sponsor of the bill in the House defended the proposal:

> Thank you, Mr. Speaker, members of the House. Real quickly, the purpose of this amendment is quite simply, somebody that's going to make a decision that is this important, you want to make sure that you're talking to the physician, the advanced practical nurse, the midwife or whomever is spelled out in this bill that that's the person you're talking to. I mean, the first time you may see this doctor, maybe on the operating table while you're already anesthetic and how do you know this is the doctor or the person you're supposed to be talking to. I mean, that is terrible consequence to rely on somebody you've never met before in your life and to take them at face value that this is the person who may be performing the operation or has the authority from the physician to talk to me over a telephone. That is very dangerous, especially when you're talking about the symptoms and consequences of an abortion. I would think you would want to talk personally to the person who may be performing that and know that they have—know that they are the person indeed that they are.

Id. at 4. The House then voted to adopt the amendment adding the "in the presence" requirement. The Senate eventually concurred with all House amendments, and the bill was enacted by overriding the Governor's veto.

No evidence before this court suggests that Indiana women seeking an abortion face a material risk of telephonic impersonation of health care professionals—the only purpose advanced in support of the "in the presence" requirement during the actual legislative debate.

Defendants suggest another purpose for the "in the presence" requirement—that "sound medical practice" recognizes the possible benefit of providing medical risk and fetal development information in person after an actual physical examination rather than over the telephone. See Def. Post-trial Br. at 18 ("The legislature could reasonably believe a face-to-face meeting would permit the physician to determine the gestational age of the fetus and the likely risks to the mother...."). Courts often indulge the assumption, without clear evidence, that legislators may have actually considered points that could support the constitutionality of a law. After all, what is important in a lawsuit may be different from what seemed immediately important in the thrust and parry of floor debate.

The problem with defendants' argument is that it requires reading into the language of Public Law 187 a requirement that the person providing the information conduct a visual or physical examination of the woman when the mandated information is provided. No such requirement is stated in the statute. Additionally, the statute does not mandate that the required information be tailored to fit the individual medical needs of each woman. In fact, the evidence shows that plaintiffs use a "script" or a recording made by a physician in which the same information is provided to all women. See Tr. 7-9, 210; Ex. 364 at 11-12. There is no evidence tending to show how the "in the presence" requirement actually furthers the state's legitimate interests in maternal health or in protecting potential life.

In *Karlin v. Foust*, the Seventh Circuit considered the purpose prong of the undue burden test as applied to Wisconsin's informed consent statute, which is similar to Public Law 187. That statute required that a woman give her voluntary and written consent to an abortion, and that certain information be provided orally to a woman in person at least 24 hours prior to the abortion. Although the district court

found certain provisions of the statute unconstitutional and therefore severed them from the statute, the court also found that the statute as a whole did not have the effect or purpose of imposing an undue burden on a woman's right to choose. See 188 F.3d at 457.

On appeal, the plaintiffs argued that the district court had erred in concluding that the statute did not have the purpose of imposing an undue burden on a woman's right to an abortion. The Seventh Circuit began its discussion of the purpose prong by reaffirming *Casey*'s holding that "a statute is considered to have an invalid purpose only if the means chosen by the state to further its legitimate interests in protecting potential life and maternal health are calculated to hinder a woman's free choice, rather than to inform it." *Id.* at 493, citing *Casey*, 505 U.S. at 877-78, 112 S. Ct. 2791. The court then noted that the joint opinion in *Casey* and the Supreme Court's later decision in *Mazurek v. Armstrong*, 520 U.S. 968, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997), "suggest that such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose." *Karlin*, 188 F.3d at 493. The court explained:

> It is reasonable to conclude that the Court's decision [in *Casey*] not to engage in any inquiry into the Pennsylvania statute's purpose indicates that the nature and structure of that statute's provisions coupled with the express indication of the Pennsylvania legislature contained in the Pennsylvania statute's purpose section, were more than sufficient to show that the statute was passed with a proper purpose or purposes in mind. *Casey* would seem to indicate that the Court would not scrutinize too closely the stated purpose or purposes of a regulation given the state's legitimate interest from the outset of a woman's pregnancy in persuading women to choose childbirth

> over abortion *as long as the regulation was reasonably designed to further that interest.*

Id. at 493 (internal citations omitted) (emphasis added). The Seventh Circuit noted that *Mazurek* "suggests that plaintiffs challenging abortion statutes will face significant difficulty in showing that an otherwise constitutional abortion regulation was enacted with an improper purpose." *Id.* at 494.

Defendants point out here that there has been no "explicit indication" from the state that it was acting in furtherance of an improper purpose. *Karlin* did not hold, however, and this court does not believe that *Casey* requires, that the legislature must admit to an improper purpose before a court can find that a statute fails the purpose prong of the undue burden standard. See *Okpalobi v. Foster*, 190 F.3d 337, 355 (5th Cir. 1999) (rejecting the view that, "for a court to hold that a measure has the impermissible purpose of placing an undue burden on a woman's right to an abortion, the legislature actually has to admit to such a purpose"), *vacated on other grounds*, 244 F.3d 405 (5th Cir. 2001) (*en banc*). Nevertheless, the court need not reach a final conclusion as to whether the evidence in this case shows an improper purpose for the "in the presence" requirement. The evidence of the law's likely effects clearly shows that the law will impose an undue burden on women and their constitutional right to choose to end a pregnancy. The "in the presence" requirement is unconstitutional because of its effects. The court need not try to divine its purpose.

VI. *Equal Protection Analysis*

Plaintiffs have argued that the "in the presence" requirement of Public Law 187 also violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against women. It is difficult to imagine legislation regulating abortions or access to them that does not affect women more than men. That much has been clear

since long before *Roe v. Wade*. In light of all the attention devoted to litigating abortion rights under the Due Process Clause, the court does not see a basis for applying any different standard by invoking the Equal Protection Clause. The court therefore concludes that the Equal Protection theory adds nothing to plaintiffs' case and declines to address it further.

VII. *Severability and Injunctive Relief*

The court concluded in 1997 that the "in the presence" requirement was severable from the rest of Public Law 187. *A Woman's Choice*, 980 F. Supp. at 974. Plaintiffs have indicated they do not seek to revisit that issue. Pl. Post-trial Br. at 6 n. 4. The court remains of the view that the "in the presence" requirement is severable. Accordingly, the court will enter a final judgment with a permanent injunction enjoining the defendant class from enforcing the "in the presence" requirement. The remaining provisions of Public Law 187, in light of their construction by the Supreme Court of Indiana, will remain in effect.

Date: March 30, 2001

/s/

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

A WOMAN'S CHOICE-EAST SIDE WOMEN'S CLINIC; Indianapolis Women's Facility; A Clinic for Women, Inc.; Planned Parenthood of Central and Southern Indiana, Inc.; Fort Wayne Women's Health Organization, Inc.; Ulrich G. Klopfer, D.O.; Women's Pavilion, Inc.; and Friendship Family Planning Clinic of Indiana, on behalf of themselves and their patients seeking abortions, Plaintiffs,

v.

Scott C. NEWMAN, in his official capacity as Prosecuting Attorney for Marion County, and as representative of the class of all prosecuting attorneys in the State of Indiana; and John C. Bailey, M.D., in his official capacity as Commissioner of the Indiana Department of Health, Defendants.

CAUSE NO. IP 95-1148-C H/G.

MODIFIED PRELIMINARY INJUNCTION

For the reasons set forth in the court's Entry on Motion to Modify or Vacate Preliminary Injunction issued November 9, 1995, is hereby MODIFIED as follows: First, the original Preliminary Injunction shall remain in effect as applied to any abortions performed before November 14, 1997. Second, effective as applied to abortions performed on or after November 14, 1997, defendant Commissioner of the Indiana State Department of Health and the defendant class of all Prosecuting Attorneys in the State of Indiana are hereby RESTRAINED, ENJOINED, AND PROHIBITED from enforcing and/or threatening to enforce the requirement in Ind. Code § 16-34-2-1.1(a) that the information mandated

by that statute be provided "in the presence" of the pregnant woman before an abortion is performed. This order is binding upon the Commissioner of the Indiana Department of Health, each member of the defendant class of Prosecuting Attorneys in the State of Indiana, and their respective agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this injunction. As applied to abortions performed on or after November 14, 1997, however, defendants may enforce all provisions of Ind. Code § 16-34-2-1.1 other than the "in the presence" requirement.

This modified preliminary injunction supersedes the court's preliminary injunction issued November 9, 1995. This modified preliminary injunction shall remain in effect until the court issues its final judgment in this action, or until modified by court order.

So ordered.

Date: October 14, 1997

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

ENTRY ON MOTION TO MODIFY OR VACATE PRELIMINARY INJUNCTION

HAMILTON, District Judge.

On November 9, 1995, this court issued a preliminary injunction enjoining enforcement of Indiana's Public Law 187 enacted in 1995. See *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434 (S.D. Ind.1995). Public Law 187 requires that at least 18 hours before a woman may have an abortion to terminate a

pregnancy, she must be given certain medical information and information concerning alternatives to abortion. See Ind. Code § 16-34-2-1.1.

In issuing the preliminary injunction, the court concluded that plaintiffs were likely to succeed on two separate challenges to the law. First, the "medical emergency" exception to the 18-hour waiting period and information requirements in Public Law 187 appeared to be much too narrow to pass constitutional muster. That conclusion led to an injunction against the entire act. Second, under the controlling "undue burden" standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877-78, 112 S. Ct. 2791, 2820-21 (1992), the law's requirement that the State-mandated information be provided "in the presence" of the woman seeking an abortion appeared to impose an unconstitutional burden on a woman's right to choose to have an abortion. As a practical matter, that provision requires the vast majority of women seeking an abortion to make two trips to an abortion clinic. For many women that requirement would make abortion more expensive and less convenient, but it would not actually prevent them from obtaining an abortion. But for a significant fraction of women affected by the law—especially those in abusive or potentially abusive relationships—the requirement is likely to prevent them from obtaining abortions they would otherwise choose to have. See *A Woman's Choice v. Newman*, 904 F. Supp. at 1453-62.

At the time the court issued the preliminary injunction, it also certified questions to the Supreme Court of Indiana concerning the interpretation—as a matter of State law—of the medical emergency exception to the law's requirements. The Supreme Court of Indiana has answered this court's certified questions. A majority of that court disagreed with this court's predictions about the scope of the medical emergency exception in the law. See *A Woman's Choice-*

East Side Women's Clinic v. Newman, 671 N.E.2d 104 (Ind.1996). After the Supreme Court of Indiana denied rehearing in the case, defendants moved to vacate or modify the court's preliminary injunction. The parties have submitted briefs, affidavits, deposition testimony, and oral argument. Neither side sought an evidentiary hearing on the motion.

Upon consideration of the parties' submissions, the court concludes: (1) the Supreme Court of Indiana's construction of the medical emergency exception is sufficient to persuade the court that the law's enforcement should not be entirely enjoined, and (2) the grounds for the preliminary injunction against enforcement of the "in the presence" requirement in Public Law 187 remain valid. Accordingly, the court will modify its injunction to permit enforcement of the waiting period and mandatory disclosure provisions of Public Law 187. These provisions of the law appear likely to be useless, patronizing, and annoying, and there is no evidence that these provisions will actually serve any constitutionally legitimate purpose. Nevertheless, this court is bound to apply the controlling "undue burden" standard set forth in the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 877-78, 112 S. Ct. at 2820-21. On the existing record, plaintiffs are not likely to succeed in showing that the mandatory disclosure and waiting period requirements will impose burdens that will actually prevent a substantial number of women from having abortions they would otherwise choose to have.[1] However, plaintiffs are still likely to succeed on their challenge to the

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[1] Under the approach advocated by Justice Stevens in his opinion dissenting in part in *Casey*, the plaintiffs would appear likely to succeed on their challenges to the mandatory disclosure and waiting period requirements. There is no evidence that the delay and mandatory disclosure will actually serve a "useful and legitimate purpose." 505 U.S. at 920-21 & n. 6, 112 S. Ct. at 2843 & n. 6.

"in the presence" requirement The court will continue the injunction against enforcement of that requirement, so that the State-mandated information may be provided by telephone. The modification will take effect one month from today.

I. *The "Medical Emergency" Exception*

In regulating abortions, States must ensure that their regulations do not cause significant harm to the health of the pregnant woman. See *Roe v. Wade*, 410 U.S. 113, 164-65, 93 S. Ct. 705, 732-33 (1973) (even after fetus becomes viable, State may not regulate or prohibit abortions necessary to preserve life or health of the mother); *Doe v. Bolton*, 410 U.S. 179, 192, 93 S. Ct. 739, 747-48 (1973) (medical judgment about need for abortion may be exercised in light of all factors relevant to patient's well-being, including "physical, emotional, psychological, and familial [factors], and the woman's age"); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 880, 112 S. Ct. at 2821-22 (if statute foreclosed possibility of immediate abortion despite "significant health risks," Supreme Court "would be required to invalidate the restrictive operation of the provision"). Public Law 187 contains an exception to the disclosure and waiting period requirements when a woman faces a "medical emergency." As defined in Public Law 187, a "medical emergency"

> means a condition that, on the basis of the attending physician's good faith clinical judgment, complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

Ind. Code § 16-18-2-223.5. A physician who believes there is a medical emergency must provide information concerning that medical judgment to the woman:

> When a medical emergency compels the performance of an abortion, the physician who will perform the abortion shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert:
>
> (1) the woman's death; or
>
> (2) a substantial and irreversible impairment of a major bodily function.

Ind. Code § 16-34-2-1.2.

In deciding plaintiffs' motion for a preliminary injunction, this court had to predict how the Supreme Court of Indiana would interpret the medical emergency exception as a matter of State law. At the same time, because there were reasonable grounds for disagreement on controlling issues of State law, the court granted defendants' motion to certify issues of State law to the Supreme Court of Indiana pursuant to Rule 15(O) of the Indiana Rules of Appellate Procedure. This court certified three questions to the Supreme Court of Indiana:

> (1) Does the definition except a woman from compliance with Ind. Code § 16-34-2-1.1 when such compliance would in any way pose a significant threat to the life or health of the woman?
>
> (2) Does the definition except a woman from compliance with Ind. Code § 16-34-2-1.1 when such compliance threatens to cause severe but temporary physical health problems for the woman?
>
> (3) Does the definition except a woman from compliance with Ind. Code § 16-34-2-1.1 when such compliance

threatens to cause severe psychological harm to the woman?

As things turned out, there were indeed reasonable grounds for disagreement. The Supreme Court of Indiana answered yes to the first and third questions by votes of 3-2, and no to the second question by a unanimous vote. 671 N.E.2d at 106.

In view of the narrow language used in the medical emergency provision, the committee amendment, the House floor amendment restoring the original language, and the House sponsor's insistence that the restrictive language was needed to prevent the exception from being applied to the broad concept of "health" used in *Doe v. Bolton*, it is difficult to see any additional steps the State legislature could have taken to show that it indeed meant to enact a medical emergency exception as narrow as the statutory language suggests. See generally 904 F. Supp. at 1468-72. Nevertheless, this debate over State law is now over. The States are free to allocate the lawmaking function to whatever branch of State government they may choose; the federal Constitution does not restrict their choices. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n. 6, 101 S. Ct. 715, 723 (1981); *id.* at 479-81 & nn. 3-5, 101 S. Ct. at 732-33 nn. 3-5 (Stevens, J., dissenting); *Uphaus v. Wyman*, 360 U.S. 72, 77, 79 S. Ct. 1040, 1044-45 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 256-57, 77 S. Ct. 1203, 1214-15 (1957) (Frankfurter, J., concurring in the judgment); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612-13, 57 S. Ct. 549, 551-52 (1937); *Dreyer v. Illinois*, 187 U.S. 71, 84, 23 S. Ct. 28, 32 (1902). For the federal courts, the interpretation of the statute by the Supreme Court of Indiana is conclusive as a matter of State law.

Defendants assert that the Supreme Court of Indiana has removed any constitutional defects in the medical emergency exception. In addition to the specific answers to the three

certified questions, defendants rely on several comments by the State court: that "all relevant factors pertaining to a woman's health can, indeed must, be considered when deciding whether to dispense with the statute's informed consent provisions," 671 N.E.2d at 108- 09; that the statute "permits immediate abortion far short of medical calamities;" that a physician "may dispense with the statutory informed consent requirements when she concludes in her best clinical judgment that her patient's condition indicates an abortion is medically necessary," *id.* at 110; and that the exception "excuses a woman from the informed consent requirement when there is a significant threat to her life or health, physical or mental," *id.* at 111. The State court made clear its commitment to upholding the statute. The majority commented that "we might well modify our view of the statute's demands if doing so would preserve its constitutionality." *Id.* at 110. As the defendants now contend in this court, the State court has essentially construed the statute to mean that a physician may dispense with the waiting period and mandatory disclosure requirements if the physician determines in good faith that it is in the patient's best medical interest to dispense with those requirements. Transcript of July 3, 1997, Hearing at 9-10. As a matter of State law, the medical emergency exception now effectively applies whenever a physician makes a good faith clinical judgment that compliance with the informed consent and waiting period requirements would present "a significant threat to the life or health of the woman." See 671 N.E.2d at 108.

Plaintiffs contend that the medical emergency exception is still unconstitutional and that the court should therefore leave in effect its injunction against enforcement of Public Law 187 in its entirety. To support their position, plaintiffs have focused on the State court's holding that the medical emergency exception does not apply where compliance with the waiting period and informed consent provisions of the

statute "threatens to cause severe but temporary physical health problems for the woman." Plaintiffs contend first, that there is a category of "severe but temporary" health problems that can be alleviated by an immediate abortion; second, that requiring a woman in those circumstances to comply with the waiting period causes an undue burden on her right to choose to have an abortion; and third, that if a State law regulating abortion might ever be applied so as to cause any significant harm to a woman's health, enforcement of the entire law must be enjoined. Defendants dispute each of these steps in the argument.

The evidence on the "severe but temporary" issue consists of affidavits and deposition testimony from two physicians submitted in response to the State court's interpretation of the law. Although the two physicians approach legal and policy issues related to abortion from very different perspectives, they agree on most relevant medical matters. Dr. Kirtly Parker Jones submitted an affidavit identifying several conditions that could involve "severe but temporary" problems. These are situations where some form of medical intervention is necessary, and where an immediate abortion is one medically reasonable treatment but not the only medically reasonable treatment. Dr. David J. Kenley submitted an affidavit in response that provides additional information about those conditions, treatment choices, and risks.

The first condition identified by Dr. Jones is *hyperemesis gravidarum*, which involves nausea and vomiting of sufficient intensity to produce weight loss, dehydration, acidosis from starvation, alkalosis from loss of hydrochloric acid in vomitus, and hypokalemia. Nausea and vomiting are frequent and well-known symptoms in the early stages of pregnancy, but *hyperemesis gravidarum* is much more severe than "morning sickness" and lasts beyond the first 12 weeks of pregnancy. The condition can become so severe that a

woman may require hospitalization and intravenous fluids and nutrition. Both physicians agree that because even the severe condition is manageable by administration of fluids and nutrition, termination of the pregnancy is not necessary, but that it is one treatment option. Where the woman chooses to terminate the pregnancy, Dr. Jones sees no medical reason to delay an abortion, while Dr. Kenley believes it is unlikely that a brief delay of an abortion would cause physiological harm so long as the woman is being treated for the condition. That continued treatment carries modest risks of infection, as well as expense and discomfort. In any event, if the condition is severe, the patient should be stabilized before an abortion is performed, and a patient in a hospital would ordinarily be stabilized before abortion would even be discussed. Jones Dep. at 8.

The second condition identified by Dr. Jones is gestational diabetes. That condition is temporary because, by definition, the condition is resolved by delivery. But severe diabetes can be life-threatening even in the short term, and over the long term can cause blindness, heart failure, and kidney failure. Jones Dep. at 10. Even severe cases of gestational diabetes can be managed so that the pregnancy may continue to full term, most often by changes in diet. Treatment in severe cases may also include insulin injections and other forms of support from physicians and hospitals. Jones Dep. at 11; Kenley Dep. at 26. But termination of the pregnancy is another possible treatment for the condition. Where a woman chooses to have an abortion, Dr. Jones sees no medical reason to delay, while Dr. Kenley sees no medical risk from a brief delay so long as the patient is receiving treatment for the condition. In the most severe cases, where insulin must be administered, good medical practice would require delaying an abortion until the patient is stabilized. There are some risks associated with continued treatment, although those risks appear to be modest and manageable,

and continued treatment also requires additional expense. Jones Dep. at 12.

The third condition identified by Dr. Jones is preeclampsia, which is pregnancy-induced hypertension with protein in the urine. The condition can progress to eclampsia, which can involve seizures, liver failure, kidney failure, and cardiac failure. Jones Dep. at 13. Preeclampsia is most dangerous in the second trimester. Jones Dep. at 38. The condition gets progressively worse until delivery or termination of the pregnancy. *Id.* at 39. Dr. Kenley agrees that in its most severe form, preeclampsia can be life-threatening. Kenley Dep. at 41. Preeclampsia constitutes a medical emergency under virtually anyone's definition, although termination of the pregnancy is not the only treatment option. See Kenley Dep. at 62-63; Jones Aff. ¶ 5. Other available treatments include medication to reduce blood pressure. Dr. Jones asserts that when a woman with preeclampsia elects treatment by abortion, there is no medical reason to delay an abortion, and in fact immediate abortion may well be necessary in severe cases. Jones Dep. at 14-15. The condition can progress quickly, so delay can present significant health risks even in cases that are not severe at the moment: "given that this disease gets worse with time and occasionally quite rapidly, we now have a woman who is not permanently ill, but might be tomorrow." Jones Dep. at 15. Dr. Kenley asserts that a woman with preeclampsia ordinarily would experience no negative medical consequences from delay of an abortion if her condition were treated in the interim. The Supreme Court of the United States concluded in *Casey* that preeclampsia is covered by the Pennsylvania medical emergency definition. 505 U.S. at 880, 112 S. Ct. at 2821-22. In view of the Indiana court's view that the Indiana legislature intended to adopt the judicial interpretation of the Pennsylvania statutory language, see 671 N.E.2d at 108-10, preeclampsia is a

"medical emergency" within the meaning of the Indiana statute.

The fourth condition identified by Dr. Jones is premature rupture of the membranes. The rupture of the membranes surrounding the fetus causes loss of amniotic fluid and creates risks of infection, which can lead in turn to sepsis, kidney failure, and potentially the death of both the woman and the fetus. If rupture occurs before the fetus is viable, abortion is one prudent medical treatment, but it is by no means the only choice. Even when such ruptures occur relatively early in a pregnancy, they can be treated to allow continuing the pregnancy to full term. At the time of Dr. Kenley's deposition, for example, he had a patient whose membranes had ruptured 13 weeks earlier, and she was being treated at home. Kenley Dep. at 51-52. However, if a woman whose membranes have ruptured is already infected by the time she sees a physician, delay in terminating the pregnancy may cause grave illness and death. Jones Dep. at 19; see also Kenley Dep. at 42. Septic shock from premature rupture of the membranes (including botched attempted abortions, especially before abortions became generally legal) was one of the most common reasons for maternal death in this country and continues to be one of the most common reasons for maternal death throughout the world. Jones Dep. at 19. Delay increases the risk of sepsis, as well as the expense of continued hospital treatment. Dr. Kenley agrees with Dr. Jones that if the woman has an "obvious infection," an immediate abortion would be appropriate. Kenley Dep. at 35-36. In the absence of an infection, Dr. Jones sees no medical reason to delay an abortion if the woman chooses one, whereas Dr. Kenley sees little medical risk from a brief delay so long as the condition is being treated.

In her deposition, Dr. Jones also described a condition called *herpes gestationis* in which a pregnant woman

experiences severe skin eruptions and blistering that is "not life threatening" but is "horrifyingly miserable." Jones Dep. at 22. The condition can be so severe in some cases that it leads a woman to decide to terminate the pregnancy, and in those cases, the patient can be sedated before an abortion is performed. Dr. Kenley says the condition can be treated with antihistamines and steroids and that it is not a medical emergency and not a reason to terminate a pregnancy. Kenley Dep. at 52-53. When asked about the consequences of delay for 24 or 48 hours for a woman who chooses to have an abortion, Dr. Kenley testified: "There would be no consequence. The mother would continue to itch and be uncomfortable during that time period, but there would be no long-term adverse physical consequences." *Id.* at 53. Where a woman chooses to have an abortion, Dr. Jones sees no medical reason to delay an abortion to relieve her from "suffering." Jones Dep. at 22-23, 37.

Based on this evidence, plaintiffs argue these medical conditions present situations in which Public Law 187, as interpreted by the Supreme Court of Indiana, would require a woman to comply with the waiting period and mandatory disclosure consent provisions of the law where delay would create a significant health risk. The court is not persuaded there is a danger that the law would be applied that way in any meaningful number of cases. Although this court predicted earlier that the State courts would adhere to the narrow and restrictive language in the medical emergency exception, the State court's interpretation of the law recognizes a broad range of "significant" health risks and shows an intention to give considerable latitude to a treating physician's clinical judgment. Plaintiffs contend that the possibility that compliance with the law could subject a woman to "severe but temporary" harms renders the statute unconstitutional. That possibility could become a reality only if a woman: (a) wants an immediate abortion; (b) is able as a matter of logistics, apart from the effects of Public

Law 187, to obtain an immediate abortion; and (c) suffers from a medical condition that threatens "severe but temporary" medical problems if an abortion is delayed. Based on the evidence presented thus far, that possibility exists at least in theory, but it is more likely that very few women, perhaps no women, would actually satisfy all three of those criteria in a given year.[2]

Plaintiffs argue that where there is no medical reason to delay a woman's choice of an abortion, subjecting a woman to a delay violates her constitutional right to choose an abortion. That position is not consistent with the controlling opinion in *Casey*. By upholding Pennsylvania's waiting period law against a facial challenge, a majority of the Court in *Casey* made clear that the timing of an abortion, at least within narrow limits, may be subject to State regulation for reasons other than medical ones.

Based on the medical evidence presented here, plaintiffs also make a more fundamental point about the constitutional requirement—recognized by the Supreme Court from *Roe* through *Casey*—that State regulation of abortion must not threaten significant harm to the health of a woman. The evidence from Dr. Jones and Dr. Kenley shows several medical conditions for which an immediate abortion may be one reasonable medical treatment, but where other treatments are also available and can minimize any medical risks from delay. Plaintiffs argue that a woman facing serious medical complications from a pregnancy should not be required to put up with alternative treatments even temporarily merely to

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[2] Indiana residents obtain approximately 15,000 induced abortions each year, and only a small portion of those are performed for medical reasons of any kind, let alone emergencies. In addition, in the absence of clear-cut emergencies, patients often experience logistical delays in scheduling abortions. Dr. Kenley points out that many patients who need or want particular forms of treatment, including surgery, are often forced to wait for logistical reasons. Kenley Dep. at 22-24.

indulge the State's useless demand that she have more time to contemplate her choice. Plaintiffs argue that in such a case, the statutory delay effectively forces upon a woman unwelcome medical treatment. That choice, plaintiffs contend, invades a woman's well established right to make her own choices about her own medical treatment. For example, during the delay before an abortion can be performed, sound medical practice may call for continued administration of intravenous fluids and nutrition (for *hyperemesis gravidarum*), administration of insulin (for gestational diabetes), or administration of antibiotics (for premature rupture of membranes). All of these treatments carry with them their own risks, although they are generally low, and their expenses, which may be very substantial, especially if care is being provided in a hospital.[3]

Plaintiffs argue that if the medical emergency exception in Public Law 187 is interpreted to require a woman to undergo other unwelcome medical treatment in order to protect her health while she waits the mandated time before an abortion, then the medical emergency exception is still unconstitutional. The court agrees that such an interpretation would raise grave constitutional difficulties. The root of the constitutional problem is a person's right to make her own decisions about her own medical treatment. The Supreme Court of the United States has long recognized a constitutional privacy right that severely limits the ability of a State to require a person to undergo medical treatment without that person's informed consent. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851 (1990), discussing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905) (upholding

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[3] Dr. Jones noted that in some of these cases, interim care in a hospital's intensive care unit would be appropriate. No one suggests that the State of Indiana would be willing to pay for the additional expense of medical care required for compliance with Public Law 187.

compulsory vaccination during outbreak of smallpox); *Washington v. Harper*, 494 U.S. 210, 221-22, 229, 110 S. Ct. 1028, 1036-37, 1040-41 (1990) (prisoners possess significant liberty interest in avoiding unwanted administration of antipsychotic drugs); *Vitek v. Jones*, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264 (1980) (transfer to menial hospital and mandatory behavior modification treatment implicates liberty interests); and *Parham v. J.R.*, 442 U.S. 584, 600, 99 S. Ct. 2493, 2503 (1979) (children and adults have substantial liberty interest in not being confined unnecessarily for medical treatment).

To this court's knowledge, the Supreme Court has not held or even suggested that a State may require a woman, as a condition of exercising her constitutional right to choose to terminate her pregnancy, to consent to some other form of medical treatment that she would otherwise refuse. Thus, the evidence showing that other medical treatments may often be available to preserve a woman's life and health in the interim before an abortion can be performed under Public Law 187 does not necessarily resolve the constitutionality of the medical emergency exception to the law. In more concrete terms, if a woman is suffering from a severe instance of *hyperemesis gravidarum* or gestational diabetes, the question is whether the State may require that woman to be treated for a day or two or three in a hospital before she is permitted to have the abortion that she wants immediately and a physician is prepared to perform immediately. The court is not aware of any other situation in which the State would try to dictate such a choice among generally acceptable medical treatments for a serious health condition.

The medical emergency exception to Public Law 187 would therefore raise grave constitutional problems if it were interpreted to prohibit a physician from considering a competent patient's refusal to undergo further alternative medical treatment, or the medical consequences of such

refusal, in determining whether an immediate abortion is medically necessary. This court believes that the State court's authoritative interpretation of the law shows that it should not be interpreted to prohibit such considerations when a physician exercises good faith medical judgment. The opinion of the Supreme Court of Indiana in this case shows that a physician may exercise her "best clinical judgment" as to whether the patient's condition "indicates an abortion is medically necessary" and may consider "all significant factors relevant to the woman's health." 671 N.E. 2d at 110. Because the State court has interpreted the State law to save its constitutionality and to avoid any significant threat to a woman's health, the law should be construed so that it does not force a woman who wants an immediate abortion and her physician to choose between accepting unwelcome alternative medical treatment and serious risks to her health while the abortion is delayed. Put another way, the relevant analysis of a patient's medical need for an immediate abortion may assume in most cases that the patient will receive other treatment in a hospital (such as intravenous fluids and nutrition, insulin, antibiotics, medication to reduce blood pressure, etc.). But if the patient is unwilling to accept such alternative treatments, the analysis may take into account that absence of other treatment in the interim before an abortion can be performed. As Dr. Kenley testified in his deposition, even where such treatments are medically indicated, physicians and hospitals do not give such treatments over the objection of a patient. Kenley Dep. at 34-35, 67. In view of the State court's expressed intention to save the constitutionality of the statute if a reasonable construction would save it, this court construes the medical emergency exception so as not to require a woman who wants an immediate abortion to subject herself to other medical treatments that she does not want in the interim. The medical emergency exception therefore does not prohibit a physician from evaluating the medical

consequences of delay or a patient's refusal to undergo alternative treatments in the interim.

The opinion of the Supreme Court of Indiana has not answered all imaginable questions about the application of the medical emergency exception in Public Law 187, nor can this court do so, even with the additional medical evidence on its possible application. The State court has plainly decided that the medical emergency exception must give wide latitude to a physician's good faith clinical judgment about her patient's best medical interests. The defendants have agreed, seeing no difference between the State court's interpretation and a law that allows the physician to dispense with the waiting period and mandatory disclosure requirements if she determines that it is in the patient's best interests to do so. Transcript of July 3, 1997, Hearing at 9-10. Nevertheless, there may be some situations in which the Indiana statute might still be deemed unconstitutional. For example, in a severe case of *herpes gestationis*, Dr. Jones and Dr. Kenley agree that delay in an abortion that would cure the condition would not cause long- term adverse health consequences for the woman. Jones Dep. at 21-23; Kenley Dep. at 52-53. Where an adult woman has made an informed and rational choice to end a pregnancy, it is difficult to see what legitimate governmental purpose would be served by requiring her to continue her suffering, in Dr. Jones' language, while she contemplates further the State-mandated information. It is especially difficult to see such a legitimate purpose in the absence of any evidence in this record that providing the information actually has any effectiveness at all in achieving the law's stated purpose. See 904 F. Supp. at 1450-52, 1475.

The record before this court therefore does not show beyond doubt that the medical emergency exception in Public Law 187 will always be constitutional as applied to any individual situation. But the applicable standard here is far

more deferential to the State law. The ability of judges or lawyers to imagine a situation in which the medical emergency exception might be unconstitutional as applied does not require that the operation of the entire act be enjoined. As the Supreme Court stated the matter in *Casey*, if the statute foreclosed the possibility of an immediate abortion despite some significant health risks, the Court "would be required to invalidate *the restrictive operation* of the provision. . . ." 505 U.S. at 880, 112 S. Ct. at 2821-22 (emphasis added). It is one thing to enjoin the restrictive operation of a law; it is quite another to enjoin the operation of a law of general application merely because it might be applied unconstitutionally in a few cases. On this record, there is now at best a speculative possibility of such unconstitutional application in a very small number of situations. In light of the State court's authoritative interpretation of the medical emergency exception in Public Law 187, plaintiffs have not shown a substantial likelihood of prevailing on their claim that the medical emergency exception will impose an undue burden for a significant fraction of the women who may be subject to its application. Preliminary injunctive relief is no longer warranted on this basis.

II. *The Requirement That Mandated Information Be Provided "In The Presence" of the Pregnant Woman.*

In the original decision on plaintiffs' motion for a preliminary injunction, this court held that plaintiffs were not likely to succeed on their challenges to the mandatory disclosure and 18-hour waiting period provisions of Public Law 187. There is no evidence that either provision is likely to have any actual effect toward promoting the State's constitutionally legitimate purposes. 904 F. Supp. at 1450-52. As the court explained in that opinion, however, the controlling plurality opinion in *Casey* focuses on whether the mandatory disclosure and waiting period will actually

prevent women from obtaining abortions they choose to have. There is no evidence that either of these provisions will have such an effect.

Public Law 187 also requires that the State-mandated information provided to a woman at least 18 hours before an abortion be provided "in the presence" of the woman. Ind. Code § 16-34-2-1.1. On the strength of the opinion of the Supreme Court of Indiana, defendants have asked the court to vacate the preliminary injunction in its entirety. The defendants argue that the new, broader interpretation of the medical emergency exception completely undoes this court's earlier calculus of prospects for success on the merits and the balance of equitable factors. The court disagrees. The merits of plaintiffs' challenge to the "in the presence" requirement of Public Law 187 do not depend in any way on the merits of their challenge to the medical emergency exception. Plaintiffs have always presented these as independent constitutional flaws in the statute, and the court has treated them as distinct issues.

The "in the presence" requirement has the practical effect of requiring almost any woman seeking an abortion to make at least two visits to an abortion clinic. As defendants have pointed out and this court has recognized, the plurality in *Casey* upheld a two-trip law against a facial challenge despite evidence and district court findings that the requirement would subject many women to harassment and hostility. See 505 U.S. at 885-86, 112 S. Ct. at 2824-25. Thus, to succeed on their challenge to Indiana's "in the presence" requirement, plaintiffs must come forward with evidence beyond that presented in *Casey*. Plaintiffs have done so. The court has already explained at length its reasons for concluding that plaintiffs are likely to succeed on the merits of their challenge to the "in the presence" requirement as imposing an undue burden on women's right to choose to have an abortion. See 904 F. Supp. at 1453-62. The court found that

plaintiffs have shown a substantial likelihood of showing that the "in the presence" requirement was likely to cause a significant decline—approximately 11 to 14 percent—in the incidence of abortions among Indiana women. *Id.* at 1457. The pivotal issue in that analysis was whether such a decline in the incidence of abortion was likely to be the result of the burdensome character of the law, or whether it was likely to be the result of a persuasive effect of the waiting period and mandatory disclosures. The court has given both sides the opportunity over the past 23 months to supplement the existing record on this issue, and neither side has submitted any additional evidence. Thus, the balance remains the same.

Based on the existing record in this case, plaintiffs have shown a substantial likelihood that the expected decline in the incidence of abortion would be the result of the burdens imposed by the "in the presence" requirement and not of any persuasive effect of the law. In fact, although waiting period and mandatory disclosure laws have been in effect in several States, there is still *no* evidence before this court that these laws have any persuasive effects that cause a significant reduction in the incidence of abortion. Although plaintiffs' evidence on this issue does not absolutely foreclose the possibility of a persuasive effect, plaintiffs' evidence has taken into account the additional factors that might explain the decline in abortion in Mississippi. Additional evidence also tends to support this conclusion, including the evidence of the significant changes in patterns of women crossing State boundaries in and out of Mississippi to obtain abortions. See 904 F. Supp. at 1454-55.[4] The additional

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[4] In his published study, Dr. Henshaw calculated that after the two-trip law took effect in Mississippi, the number of Mississippi residents having abortions in Alabama and Tennessee increased by 17 percent above the expected number, and the number of out-of-state residents having abortions in Mississippi decreased by 30 percent below the expected number. 904 F. Supp.. at 1454. These changes tend to support Dr.

evidence also includes the evidence concerning the effects of North Dakota's mandatory disclosure and waiting period law, which does not require two trips to the clinic, and the evidence concerning the dynamics of abusive relationships and their effects on abortion decisions. See 904 F. Supp. at 1458-59; accord, *Casey*, 505 U.S. at 897, 112 S. Ct. at 2830-31 (discussing likely effects of spousal notification requirement on women and children in abusive relationships and holding spousal notification requirement invalid on its face). All the evidence before this court tends to show that it is much more likely than not that the decline in the incidence of abortion under Mississippi's two-trip law has been the

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Henshaw's opinion that the effects of Mississippi's two-trip law are the product of burdens rather than the persuasive force of any mandated information and waiting period. These changes in interstate travel for abortions also raise a question as to whether the observed changes in Mississippi fully reflect the burdens of the law. When State laws differ, as they do with respect to waiting periods and mandatory disclosures, it is now possible for many women to escape burdensome effects of local laws by crossing State borders. But in other areas of constitutional law, the Supreme Court evaluates the effects of a State law based on the assumption that many or all other States could enact similar laws. See, *e.g.*, *Healy v. The Beer Institute*, 491 U.S. 324, 336-37, 109 S. Ct. 2491, 2499, 105 L. Ed. 2d 275 (1989) (practical effects of State law requiring beer distributors to affirm they were not selling their products at lower prices in bordering States must be evaluated under Commerce Clause by considering "what effect would arise if not one, but many or every, State adopted similar legislation"); and cases requiring "internal consistency" in State taxes, *e.g.*, *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S. Ct. 2620, 2623-24, 81 L. Ed. 2d 540 (1984) (State tax must be such that, if every State adopted it, there would be no interference with free trade); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169, 103 S. Ct. 2933, 2942, 77 L. Ed. 2d 545 (1983) (same). Lest there be any misunderstanding, the court is not suggesting there is a Commerce Clause dimension to this case. Instead, the court is suggesting that in gauging the effects of a State law regulating abortions, courts should consider the possibility that many or all States might enact similar legislation. In this case there appears to be no evidence available at this point that would permit measurement or estimate of those possible effects.

result of the burdens the law imposed and not of any persuasive effect the law might theoretically have, and that the experience in Indiana would probably be comparable.

The court did not decide in 1995 and need not decide now whether the current record would persuade the court to issue a permanent injunction against the "in the presence" requirement.[5] After a long but reasonable delay at the request of defendants to seek an authoritative declaration of Indiana law in the State courts, this case remains at the preliminary injunction stage. In deciding a motion for preliminary injunction, the court must try to minimize the risk of error. The evidence before the court shows convincingly that the "in the presence" requirement is likely every year to prevent somewhere between 1,650 and 2,100 Indiana women from obtaining abortions. See 904 F. Supp. at 1462 (law likely to cause 11 to 14 percent decline in incidence of abortion). There is no evidence before the court suggesting that such an effect would be the result of law's persuasive effect. All the evidence on the question tends to show that there is no significant persuasive effect, and that the likely decline in the incidence of abortion would be the

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[5] In *Karlin v. Foust*, 975 F. Supp.. 1177 (W.D.Wis.1997), *modified in part on other grounds*, — F. Supp.. —-, 1997 WL------ (W.D. Wis. Oct. 2, 1997), the court considered similar evidence in a challenge to a Wisconsin waiting period and mandatory disclosure statute imposing what amounts to a two-trip requirement. That evidence included Dr. Henshaw's study of the effects of the Mississippi law with its two-trip requirement, as well as some evidence of the experience in North Dakota's law permitting disclosure by telephone. The court in *Karlin* was not persuaded that the evidence was sufficient to support a permanent injunction against the Wisconsin law. 975 F. Supp. at 1177, 1217-18. As this court noted in its earlier opinion, this court might come to the same conclusion after a trial on the merits. However, plaintiffs have shown a substantial likelihood of prevailing, and the balance of harms is so one-sided on the record before this court that a preliminary injunction is warranted here to prevent irreparable harm to women in Indiana before a trial on the merits.

result of the law's burdens. Under the undue burden standard as stated and as applied in *Casey*, the "in the presence" requirement of Public Law 187 therefore appears likely to impose an undue burden on the constitutional right of women to choose whether to have an abortion or to continue the pregnancy. The injunction will remain in effect against the "in the presence" requirement.[6]

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[6] When this court issued the preliminary injunction in 1995, the Seventh Circuit had not yet addressed the application of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), to the expert opinion testimony of social scientists. See 904 F. Supp.. at 1459-62. Over the last two years, the Seventh Circuit has applied the *Daubert* standards to social scientists in several cases. See *People Who Care v. Rockford Bd. of Education*, 111 F.3d 528, 537-38 (7th Cir.1997) (statistical study claiming that achievement gap between white and minority students was caused by school officials' racial bias was inadmissible under *Daubert* because it failed to consider or correct for obvious alternative explanatory variables); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir.1997) (statistical study claiming that negative correlation between employees' age and retention proved age discrimination was inadmissible under *Daubert* because it failed to consider or correct for obvious alternative explanatory variables); *Tyus v. Urban Search Management*, 102 F.3d 256, 263-64 (7th Cir.1996) (district court erred by excluding expert testimony on effectiveness of advertising generally and effects of defendant's advertising on African-Americans); *United States v. Hall*, 93 F.3d 1337, 1342-45 (7th Cir.1996) (district court erred by excluding testimony from psychologist and psychiatrist concerning false confessions and defendant's propensity to give a false confession). In light of these opinions, the court has reconsidered its *Daubert* analysis as applied to Dr. Henshaw's testimony. The court continues to believe that analysis is correct, especially for purposes of a preliminary injunction. Unlike the profferred experts in *People Who Care* and *Tyus*, Dr. Henshaw carefully considered alternative explanatory variables and explained his analysis of them. See 904 F. Supp.. at 1454-55. Although Dr. Henshaw's work does not absolutely and conclusively disprove alternative explanations, it is still persuasive and consistent with the totality of evidence here. A statistical study "is not inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest." *People Who Care*, 111 F.3d at 537.

The plaintiffs have argued that the court should leave in place the injunction against the entire statute based solely on the probable constitutional defect in the "in the presence" requirement. They contend that the invalid portion of the law is not severable from the otherwise valid portions of the law. The severability of the "in the presence" requirement presents another question of State law. See *Leavitt v. Jane L.*, 116 S. Ct. 2068, 2069 (1996). The question in this case is not difficult. The Indiana legislature has enacted legislation instructing courts to presume in most situations that invalid portions of law should be severed from valid portions. The statute provides:

> (a) If any provision of this Code as now or later amended or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application.
>
> (b) Except in the case of a statute containing a nonseverability provision, each part and application of every statute is severable. If any provision or application of a statute is held invalid, the invalidity does not affect the remainder of the statute unless:
>
> > (1) the remainder is so essentially and inseparably connected with, and so dependent upon, the invalid provision or application that it cannot be presumed that the remainder would have been enacted without the invalid provision or application; or
> >
> > (2) the remainder is incomplete and incapable of being executed in accordance with the legislative intent without the invalid provision or application.
>
> This subsection applies to every statute, regardless of whether enacted before or after the passage of this subsection. The general assembly may preserve the legislative history of this subsection by adoption of a

concurrent resolution and publication of the resolution in the legislative journals.

Ind. Code § 1-1-1-8. The central question is whether it appears to the court that the legislature would have enacted the remainder of the law if it had known that the invalid portion could not be enforced. See *Indiana Dep't of Environmental Management v. Chemical Waste Management, Inc.*, 643 N.E.2d 331, 342 (Ind. 1994).

There is little doubt here that the legislature would have enacted the waiting period and mandatory disclosure provisions of Public Law 187 even without the "in the presence" requirement. Within the logic supporting the law, it is reasonable to suppose that the legislature would have preferred that the mandated information be provided over the telephone rather than not provided at all. The remaining portions of the law generally are internally consistent. Enforcing those provisions without the "in the presence" requirement would not produce logically absurd results. In fact, as initially passed by the Indiana Senate, the bill required only that the information be provided "orally." The "in the presence" language was added on the floor of the Indiana House of Representatives. Plaintiffs point out that the bill's chief House sponsor argued vigorously that the added requirement was important. However, the rationale offered was threadbare—the suggestion that the requirement was needed to prevent impersonation of physicians on the telephone. See 904 F. Supp. at 1464-65. The very weakness of that rationale tends to show that the "in the presence" requirement is not at all essential to the central (or at least the constitutionally permissible) purposes of the entire act.[7] In

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[7] In the original decision on plaintiffs' motion for preliminary injunction, the court did not try to decide whether the "in the presence" requirement might fall under the "purpose" prong of the undue burden test announced in *Casey*. See 904 F. Supp.. at 1465-66. Because this case is still at the preliminary injunction stage, the court still does not decide that issue.

terms of the severability statute, the remainder of Public Law 187 is not so "essentially and inseparably connected with, and so dependent upon" the "in the presence" requirement as to undermine the presumption of severability. Nor is the remainder of Public Law 187 incomplete and incapable of being executed in accordance with legislative intent without the "in the presence" requirement. The act can be enforced as requiring the waiting period after the mandatory disclosure is provided either in person or by telephone.

III. *Implementation*

The court will modify its existing preliminary injunction so as to enjoin the defendants only from enforcing the requirement in Ind. Code § 16-34-2-1.1(1) that the mandated information be provided "in the presence" of the pregnant woman. From a practical standpoint, this will cause a significant change in the way that plaintiffs operate their clinics and deal with their patients. The possibility of this change has been on the horizon for more than two years, but plaintiffs and others similarly situated will need a brief period of time to prepare to comply with the mandatory disclosure and waiting period requirements of the law consistent with this modification. Accordingly, the court will enter an order modifying the existing preliminary injunction so as to permit enforcement of Public Law 187, apart from the "in the presence" requirement, as applied to abortions performed beginning November 14, 1997.

Date: October 14, 1997

/s/

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

A WOMAN'S CHOICE-EAST SIDE WOMEN'S CLINIC; Indianapolis Women's Facility; A Clinic for Women, Inc.; Planned Parenthood of Central and Southern Indiana, Inc.; Fort Wayne Women's Health Organization, Inc.; Ulrich G. Klopfer, D.O.; Women's Pavilion, Inc.; and Friendship Family Planning Clinic of Indiana, on behalf of themselves and their patients seeking abortions,

Plaintiffs,

v.

Scott C. NEWMAN, in his official capacity as Prosecuting Attorney for Marion County, and as representative of the class of all prosecuting attorneys in the State of Indiana; and John C. Bailey, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Defendants.

CAUSE NO. IP 95-1148-C H/G.

November 9, 1995

MEMORANDUM OPINION ON MOTION FOR PRELIMINARY INJUNCTION

HAMILTON, District Judge.

The plaintiffs challenge the constitutionality of a new Indiana statute regulating abortions and seek a preliminary injunction against its enforcement. The law, known as Public Law 187, requires in almost all cases that at least 18 hours before an abortion can be performed, a woman must be given certain medical information and information concerning

alternatives to abortion. Public Law 187 is similar to a Pennsylvania law upheld by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). Plaintiffs contend that differences between the Indiana law and the Pennsylvania law together with recently available evidence about the actual effects of such laws show that Public Law 187 violates the "undue burden" test adopted by the Supreme Court in *Casey*.

The court's decision on the motion for preliminary injunction is not the court's last word on this matter. It is instead a decision based on incomplete evidence in the face of threatened irreparable harm. As explained in detail below, the court concludes that plaintiffs have established a reasonable likelihood of prevailing on the merits of their challenges to Public Law 187. They have shown that Indiana's requirement that some information be provided "in the presence" of the woman at least 18 hours before the abortion is likely to impose an undue burden on a woman's right to choose whether to continue or terminate a pregnancy. Unlike the plaintiffs in *Casey*, the plaintiffs here have come forward with evidence showing that the burdens of the law are likely to prevent abortions for approximately 11 to 14 percent of women who would otherwise choose to have them. Plaintiffs have also shown that the "medical emergency" exception of Public Law 187 probably fails to meet constitutional standards. Under principles of Indiana law, and based on the law's legislative history, it appears that the mandatory disclosure and waiting period requirements apply even when compliance would cause severe but temporary physical problems for a woman, or when compliance would cause severe psychological harm. (However, as defendants have requested, the court will certify the state law issues of statutory interpretation for decision by the Supreme Court of Indiana before this court makes a final decision on the constitutional issues in this case.) Plaintiffs have also shown that enforcement of the law

while this lawsuit is pending would cause irreparable harm to a significant number of women. On the other side of the scale, defendants have not shown that temporarily preserving the status quo is actually likely to cause substantial irreparable harm. The court will therefore enjoin enforcement of Public Law 187 pending a trial on the merits.

I. The Indiana Statute

Since long before 1995, Indiana has required physicians performing abortions to obtain the informed consent of their patients. Abortions in Indiana are criminal unless "the woman submitting to the abortion has filed her consent with her physician." Ind. Code § 16-34-2-1(1)(B). Informed consent generally requires that the patient be told the general nature of her condition, the proposed treatment or procedure, the expected outcome, the material risks, and the reasonable alternatives to the treatment or procedure. See Ind. Code § 27-12-12-2 (informed consent for purposes of medical malpractice action).

Indiana Public Law 187-1995 (referred to here as "Public Law 187") adds special mandatory disclosure and waiting period provisions for informed consent for abortions. The law requires in almost all cases that certain medical information and information about alternatives to abortion be provided to a woman orally at least 18 hours before she may have an abortion. Some of the medical information must be provided "in the presence of the pregnant woman." The law was to have gone into effect on September 1, 1995, but was enjoined from operation by this court's temporary restraining order.

The central provisions of Public Law 187 state:

An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical

emergency, consent to an abortion is voluntary and informed only if the following conditions are met:

(1) At least eighteen (18) hours before the abortion and in the presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice nurse (as defined in IC 25-23-1-1(b)), or a midwife (as defined in IC 27-12-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:

(A) The name of the physician performing the abortion.

(B) The nature of the proposed procedure or treatment.

(C) The risks of and alternatives to the procedure or treatment.

(D) The probable gestational age of the fetus, including an offer to provide:

(i) a picture of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus;

at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care from the county office of family and children.

> (B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.
>
> (C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.
>
> (3) The pregnant woman certifies in writing, before the abortion is performed, that the information required by subdivisions (1) and (2) has been provided.

Ind. Code § 16-34-2-1.1. Anyone who "knowingly" or "intentionally" performs an abortion in violation of these requirements is subject to criminal penalties. Ind. Code § § 16-34-2-1, 16-34-2-7.

Public Law 187 contains an exception to the disclosure and waiting period requirements when a woman faces a "medical emergency." As defined in Public Law 187, a "medical emergency"

> means a condition that, on the basis of the attending physician's good faith clinical judgment, complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

Ind. Code § 16-18-2-223.5. A physician who believes there is a medical emergency must provide information concerning that medical judgment to the woman:

> When a medical emergency compels the performance of an abortion, the physician who will perform the abortion shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert:

(1) the woman's death; or

(2) a substantial and irreversible impairment of a major bodily function.

Ind. Code § 16-34-2-1.2.

II. The Parties and Their Claims

The plaintiffs are seven reproductive health care facilities that provide a range of services related to pregnancy and women's health, including abortions up to 12 weeks of gestation; and Ulrich G. Klopfer, a licensed physician in Indiana who performs abortions. Plaintiffs filed their complaint on August 24, 1995, asserting that Public Law 187 will impose undue burdens on women's constitutional right to choose to have an abortion.[1] Defendants are a class of all prosecuting attorneys in the State of Indiana, with Scott C. Newman of Marion County as representative of the class; and John C. Bailey, in his official capacity as Commissioner of the Indiana Department of Health.

On August 25, 1995, asserting that the enforcement of Public Law 187 would cause immediate and irreparable harm, plaintiffs filed a verified motion for a preliminary injunction and expedited hearing. Because Public Law 187 was scheduled to take effect September 1, 1995, the court treated the motion as also requesting a temporary restraining order with notice. Defendants filed a brief in opposition. After a hearing on August 30, 1995, the court entered a temporary restraining order enjoining enforcement of the challenged law for ten days. The court also issued an order certifying the defendant class. The court deferred ruling on

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[1] In their complaint, plaintiffs also challenge an Indiana statute providing that abortions after the first trimester may be performed only "in a hospital or ambulatory outpatient surgical center." Ind. Code. § 16-34-2-1(2)(B). Plaintiffs have not requested a preliminary injunction against this provision, so it need not be addressed at this stage in the litigation.

plaintiffs' motion for a preliminary injunction pending a further evidentiary hearing. The parties agreed to extend the temporary restraining order, and the court heard evidence on plaintiffs' motion for a preliminary injunction on October 11-13, 1995. The parties have submitted their post-hearing briefs and some additional evidence of the law's legislative history.

Plaintiffs contend that the new mandatory disclosure and 18-hour waiting period requirements will impose an undue burden on a woman's right to choose whether to continue or terminate a pregnancy. Recognizing that the Supreme Court upheld a similar law against similar challenges in *Casey*, plaintiffs focus most of their attack on the likely effects of the requirement that some information be provided "in the presence of the pregnant woman" at least 18 hours before the abortion. This would require most women to make two trips to a clinic in order to get an abortion. Plaintiffs contend this requirement has no legitimate purpose and would effectively prevent some women from exercising their right to choose. Plaintiffs assert that the women who would be most affected by these burdens include women who, for a variety of reasons, would have difficulty explaining absences from husbands, partners, families, jobs, or schools; women who would have trouble paying for abortions; and women who would be especially vulnerable to harassment from anti-abortion protesters. They offer evidence that was not available in *Casey* concerning the actual effects of such laws. Plaintiffs also contend that the medical emergency exception for the mandatory disclosure and waiting period requirements is written too narrowly to meet constitutional requirements to protect the woman's health.

Defendants contend that plaintiffs cannot succeed on the merits of these claims because the Supreme Court upheld a very similar Pennsylvania law in *Casey*. They argue that plaintiffs have not provided any persuasive evidence of

undue burdens beyond the evidence that was held insufficient in *Casey*. They also argue that, despite its narrow wording, the Indiana medical emergency exception should be given the same kind of saving construction that the Third Circuit gave the Pennsylvania statute in *Casey*.[2]

III. Preliminary Injunction Standard

Before the court may enter a preliminary injunction, the moving party must demonstrate "(1) some likelihood of succeeding on the merits, and (2) that it has 'no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief is denied." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir.1992). If those elements are not satisfied, then the inquiry is over and the preliminary injunction must be denied. If those elements are met, the court then proceeds to consider "(3) the irreparable harm the non- moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Abbott Labs.*, 971 F.2d at 11-12. Accord, *e.g.*, *Vencor, Inc. v. Webb*, 33 F.3d 840, 845 (7th

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[2] On October 13, 1995, defendants filed a motion to certify the interpretation of the medical emergency exception to the Supreme Court of Indiana. This court may certify such a question, see *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1015 n. 10 (7th Cir.1994), and the Supreme Court of Indiana in its discretion may answer the question pursuant to Ind. App. R. 15(O). By separate order today, the court grants defendants' motion to certify the question, and will await action by the Supreme Court of Indiana before trying the merits in this case. However, the certification of the statutory issue does not affect this court's obligation to interpret the medical emergency exception at this time to the extent required by plaintiffs' motion for a preliminary injunction.

Cir.1994); *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir.1986).

Preliminary injunctions are designed to "minimize the hardship to the parties pending the ultimate resolution of the lawsuit," *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1453 (7th Cir.1995), and "to preserve the court's power to render a meaningful decision after a trial on the merits." 11A Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2947, at 121. Some courts have described the purpose of a preliminary injunction as the preservation of the status quo. 11A Wright, Miller & Kane § 2948, at 133. *E.g., E.E.O.C. v. City of Janesville*, 630 F.2d 1254, 1259 (7th Cir.1980). See also *Roland v. Air Line Employees Ass'n Int'l*, 753 F.2d 1385, 1392 n. 9 (7th Cir.1985) (describing how preserving status quo can mean either mandating or prohibiting action in order to prevent irreparable injury).

A preliminary injunction is not a court's last word on the question of injunctive relief, since the court is not called upon at that time to render a final decision on the merits. Therefore, at the preliminary injunction stage, the moving party does not need to prove her case beyond dispute. If the balance of harms is lopsided enough, she may not even need to prove she is more likely to prevail than not. There is no precise standard for the quantum of evidence required to obtain a preliminary injunction. Rather, the strength of the evidence and the potential harms involved are factors balanced on what the Seventh Circuit has called a discretionary sliding scale:

> The [district] court, sitting as would a chancellor in equity, . . . "weighs" all four factors in deciding whether to grant the injunction, seeking at all times to "minimize the costs of being mistaken." We call this process the "sliding scale" approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less

> likely it is the plaintiff will succeed, the more the balance need weigh towards its side. This weighing process, as noted, also takes into consideration the consequences to the public interest of granting or denying preliminary relief. While we have at times framed the sliding scale approach in mathematical terms, it is more properly characterized as subjective and intuitive, one which permits district courts to "weigh the competing considerations and mold appropriate relief."

Abbott Labs., 971 F.2d at 12 (citations and footnote omitted). Accord, *Vencor*, 33 F.3d at 845; *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir.1994). See also 11A Wright, Miller & Kane § 2948.3, at 189-97. In fact, the Seventh Circuit has said that "[i]f the harm to the plaintiff from denial of the preliminary injunction would be very great and the harm to the defendant from granting it very small, then the injunction should be granted even if the defendant has a better chance of prevailing on the merits than the plaintiff, provided the plaintiff's chances are better than negligible; and vice versa." *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir.1982). Accord, *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387-88(7th Cir.1984). This discretionary sliding scale reflects the facts that only a limited amount of information may be available as evidence at the preliminary injunction stage, and that weighing risks obviously involves a fair amount of uncertainty. See generally *Lawson Products*, 782 F.2d at 1432-36.

This standard is critical here. Some evidence has not been fully developed and other evidence has not been fully subjected to scrutiny by the opposing side. The evidence presented thus far tends to show that portions of the new law will impose undue burdens on women, but that evidence is not complete and leaves room for some doubt. Defendants have not come forward at this stage with evidence showing

that women are actually unlikely to experience such burdens. Thus, at this point, plaintiffs appear more likely to succeed than not. The evidence as to irreparable harm points decisively in favor of plaintiffs. The court will therefore grant the plaintiffs' motion for preliminary injunction to prevent irreparable harm and to preserve the status quo until the case may be heard on the merits.

IV. Likelihood of Success on the Merits

The principles that govern the merits of plaintiffs' challenges to the Indiana law are set forth in *Casey*, which must be reviewed in some detail. Those standards must then be applied to the evidence presented here concerning Indiana's mandatory disclosure and waiting period provisions, and finally to the "medical emergency" exception for those requirements.

A. *Roe*, *Casey*, and the Controlling "Undue Burden" Standard

A fundamental right of "personal privacy" is one substantive aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment. *E.g., Carey v. Population Services Int'l*, 431 U.S. 678, 684, 97 S. Ct. 2010, 2015, 52 L. Ed. 2d 675 (1977). In *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court applied constitutional protection to a woman's privacy interest in deciding whether to continue or terminate a pregnancy. At the same time, the Court acknowledged that states may regulate abortions to protect the life and health of the pregnant woman and, in some circumstances, may regulate to protect the fetus because of the state's "interest in protecting the potentiality of human life." *Roe*, 410 U.S. at 162, 93 S. Ct. at 731. The *Roe* Court balanced these interests in a trimester framework. The Court held, in summary, that during the first trimester of a nine-month pregnancy, the abortion decision must be left to the woman, and its

effectuation must be left to the medical judgment of the physician. The state could regulate abortions during the second trimester but only to promote its interest in the health of the mother. The state could regulate or even prohibit abortions after the point of viability (approximately the beginning of the third trimester) except where necessary to preserve the life or health of the mother. *Id.* at 164-65.

The Supreme Court substantially modified this analytic framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992). *Casey* dealt with a Pennsylvania statute very similar to the Indiana statute at issue here. It established a new controlling framework for analyzing constitutional challenges to state regulations of abortion. Accordingly, this court must review both the analysis and the specific holdings of *Casey* in some detail. The joint opinion signed by Justices O'Connor, Kennedy, and Souter, and joined in part by Justices Blackmun and Stevens, provided the narrowest grounds for the judgment of the Court on all questions. That opinion therefore states the controlling holdings of the Court. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 910 n. 2 (1994) (Souter, J., in chambers) (joint opinion in *Casey* is controlling); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456 n. 7 (8th Cir.1995) (same). See *Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by the Justices who concurred in the judgment on the narrowest grounds).

The *Casey* joint opinion first reaffirmed both a woman's right to choose to have an abortion before viability and the state's interests in maternal health and in the fetus. 112 S. Ct. at 2804. It reaffirmed the point of viability as a crucial chronological line in balancing those interests, but it did not legally define the medical viability point as the start of the

third trimester. *Id* at 2804, 2816-18. It also rejected the *Roe* distinction between the first and second trimester, concluding that the state's interest in the potential life of the fetus exists throughout pregnancy and that *Roe*'s trimester framework undervalues that interest. *Id.* at 2818, 2820. The joint opinion stated:

> Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. " '[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.' "

Id. at 2818 (citation omitted).

Reaffirming the central holding in *Roe* that before viability a woman has a constitutional right of privacy to decide for herself whether to terminate or continue the pregnancy, *Casey* held that the right must be protected from "undue burdens" imposed by state regulation. *Id.* at 2820. The joint opinion said: "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 2821. Thus, a statute with the *purpose* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus is invalid "because the means chosen by the State to further the interest in potential life

must be calculated to inform the woman's free choice, not hinder it." *Id.* 505 U.S. at 2820. A statute that has the effect of placing a substantial obstacle in the path of a woman's choice is also invalid because it cannot be considered a permissible means of serving the state's legitimate ends. *Id.* The joint opinion stated that a particular provision is valid unless it will operate as a substantial obstacle to "a large fraction" of the women "for whom the law is a restriction" and therefore relevant. *Id.* at 2829, 2830.

The undue burden test is best understood from its application in *Casey*. The Supreme Court applied the analysis to several sections of a Pennsylvania statute before it. A majority of the Court held that requirements of mandatory disclosure, a 24-hour waiting period, and parental consent for minors had not been shown to impose an undue burden on women seeking pre-viability abortions. See *id.* at 2822-26, 2832, 2867-69 (Justices O'Connor, Kennedy, Souter, White, Scalia, Thomas, and the Chief Justice). A different majority of the Court struck down a requirement that a married woman notify her spouse before seeking an abortion. See *id.* at 2826-31, 2843 & n. 8 (Justices O'Connor, Kennedy, Souter, Blackmun, and Stevens).

The portion of *Casey* striking down Pennsylvania's spousal notice requirement illustrates the type of showing required to meet the undue burden standard in a facial challenge before a law takes effect. The Court reviewed extensive evidence and district court findings concerning domestic violence and the role that pregnancy too often plays in triggering domestic violence. 112 S. Ct. at 2826-29. That evidence and "what common sense would suggest" persuaded the Court that women's justifiable fears of abuse triggered by spousal notification meant the law was

> likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many

> women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortions in all cases.

112 S. Ct. at 2829. The Court concluded that the spousal notification law actually would be relevant for only about one percent of women who seek abortions: only about 20 percent of the women who obtain abortions are married, and 95 percent of these notify their husbands of their own volition. *Id.* The likely consequences of the law for those five percent of married women seeking abortions were sufficient to invalidate the law on a facial challenge before it took effect. 112 S. Ct. at 2830.

Casey's holding on the spousal notification law shows that the focus of the undue burden test is not on added expense or inconvenience. The focus is on practical burdens so great that they would actually prevent a significant number of women from obtaining abortions they would otherwise choose to have. As defendants in this case point out, of course, *Casey* also held that the plaintiffs there had not proved that a mandatory disclosure and waiting period law very similar to Indiana's Public Law 187 would impose an "undue burden." The authors of the joint opinion reviewed detailed evidence and findings showing that the requirements were likely to make abortions more expensive and more difficult for many women to obtain. 112 S. Ct. at 2825. Similar effects had persuaded the Court to strike down similar laws in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 450, 103 S. Ct. 2481, 2503 (1983) (*Akron I*), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 762-63, 106 S. Ct. 2169, 2179-80, 90 (1986). The joint opinion in *Casey* framed the "undue burden" issue as whether "the 24-hour

waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate the pregnancy." 505 U.S. at 885, 112 S. Ct. at 2825. The joint opinion described the findings of increased expense and difficulty as "troubling in some respects" but found they did not demonstrate that the waiting period constituted an undue burden. *Id.*

From *Casey*'s application of the undue burden standard to both the waiting period and the spousal notice requirement, it is clear that the authors of the joint opinion upheld the disclosure and waiting period provisions because the record did not persuade them that the law was likely to be so burdensome as actually to *prevent* women from having abortions they would otherwise choose to have. At the same time, *Casey* left open the possibility that plaintiffs in future cases could prove that the burdens of such laws would actually prevent women from having abortions. The joint opinion emphasized that its conclusion on this issue was based "on the record before us." 505 U.S. at 886, 112 S. Ct. at 2826. Justice Blackmun disagreed with the joint opinion's conclusion but said he was "confident that in the future evidence will be produced to show that 'in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion.' ". 112 S. Ct. at 2845 (quoting joint opinion). The dissenting justices criticized the "undue burden" test in large part because the joint opinion left the door open for a future showing that similar disclosure and waiting period provisions would in fact impose an undue burden. 112 S. Ct. at 2879-80 (Scalia, J., joined by Rehnquist, C.J., White and Thomas, JJ.).

Two authors of the joint opinion have written more recently that the lower courts should develop a thorough record on the actual or likely effects of the particular laws that are challenged, even if the laws are nearly identical to

the laws considered in *Casey*. In *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668, 1669 (1993), the Court denied a stay and injunction pending appeal in a challenge to North Dakota's mandatory disclosure and waiting period law. Justice O'Connor, joined by Justice Souter, filed a brief opinion stating her view that the lower courts must consider the likely practical effects of a challenged law:

> [W]e made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S., at 895, 112 S. Ct. at 2830. And the joint opinion specifically examined the record developed in the district court in determining that Pennsylvania's informed-consent provision did not create an undue burden. See *id.* at 885-98, 112 S. Ct. at 2825-2831 (opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). While I express no views as to whether the particular provisions at issue in this case constitute an undue burden, I believe the lower courts should have undertaken the same analysis.

113 S. Ct. at 1669. Similarly, in *Casey* itself, after remand from the Supreme Court, the case returned to Justice Souter on an application to allow the district court to hear additional evidence on the likely effects of the Pennsylvania statute. Justice Souter denied that application but explained that "litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 911 (1994) (Souter, J., in chambers).

The portions of *Casey* striking down the spousal notification law but upholding mandatory disclosure and a waiting period raise an important issue concerning both the timing and scope of plaintiffs' challenge here. The *Casey* plaintiffs challenged the Pennsylvania laws before they took

effect and sought to have them struck down as facially unconstitutional, so that the laws could not be enforced at all. The Supreme Court was persuaded that the spousal notice law was likely to pose a substantial obstacle to some significant fraction of the women it affected, and therefore held the law facially unconstitutional before it ever took effect. 112 S. Ct. at 2829-31. That approach contrasts with a standard for facial challenges announced and applied in some earlier cases: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987), followed in *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (facial challenge to regulations affecting abortion and family planning counseling); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment) (facial challenge to several abortion statutes).

The statement of the undue burden standard and its application to strike down the spousal notification law in *Casey* do not seem consistent with the Salerno standard. Since *Casey*, the lower courts have disagreed about how to handle facial challenges to abortion statutes. Some have held that because *Casey* expressly overruled other cases and did not mention *Salerno*, the heightened standard from *Salerno* still applies to abortion cases. *See Barnes v. Moore*, 970 F.2d 12, 14 & n. 2 (5th Cir.1992); *Jane L. v. Bangerter*, 809 F. Supp. 865, 871-72 (D.Utah 1992*), aff'd in part and rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir.1995). See also *Ada v. Guam Society of Obstetricians & Gynecologists*, 113 S. Ct. 633, 634 (1992) (Scalia, J., dissenting from denial of certiorari, joined by Rehnquist, C.J., and White, J.,) (*Casey* did not purport to change *Salerno* standard for facial challenge; law prohibiting all abortions should be upheld against facial challenge because it could be applied to some

post-viability abortions). Other courts have followed the lead of Justices O'Connor and Souter, as expressed in *Fargo Women's Health Organization v. Schafer*, and have concluded that *Salerno* does not apply to abortion restrictions. See *Planned Parenthood, Sioux Falls Clinic*, 63 F.3d 1452, 1456-58 (8th Cir.1995); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 863 n. 21 (3d Cir.1994) (on remand) (*dicta*). See also *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454, 1462-64 (W.D.Wash.1994) (applying undue burden test from *Casey* rather than *Salerno* standard to facial challenge of statute prohibiting physician- assisted suicide), rev'd, 49 F.3d 586, 591 (9th Cir.) (application of *Casey*'s undue burden standard for facial challenge was "unwarranted extension of abortion jurisprudence"), *rehearing en banc granted*, 62 F.3d 299 (9th Cir.1995).

It is true that *Casey* did not expressly overrule or limit *Salerno*. However, the *Casey* Court's actions and statements conflict with the standard stated in *Salerno*. *Casey* is very closely on point here, and more recent. In addition, Justices O'Connor and Souter have indicated clearly in the Fargo case and in *Casey* on remand that a law "constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a women's choice to undergo an abortion.' " 113 S. Ct. at 1669 (quoting 112 S. Ct. at 2830). Therefore, like the Third and Eighth Circuits, this court believes that *Casey* effectively displaced *Salerno*'s application to abortion laws. See *Planned Parenthood, Sioux Falls Clinic*, 63 F.3d at 1458 ("We choose to follow what the Supreme Court actually did--rather than what it failed to say--and apply the undue-burden test."). See also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan.L.Rev. 235, 276 (1994) (*Casey* joint opinion applied "substantial overbreadth" test, which conflicted with *Salerno*

rule but was consistent with other substantive due process decisions).

What kind of proof would suffice to successfully challenge the Indiana abortion restriction under the undue burden test? The portion of *Casey* striking down the spousal notice law showed that the evidence of a law's likely effects may be so strong that the "undue burden" for a significant fraction of women will be evident enough even before the law takes effect. *Casey* also demonstrated that the likely effects of mandatory disclosure and waiting period laws were not so likely to cause undue burdens as to persuade the Court to strike them down before they took effect. However, *Casey* clearly left several avenues open for such challenges. One possibility for plaintiffs is to wait until the law takes effect and then to present testimony from a number of women explaining how the law had actually prevented them from having abortions. A moment's reflection shows it is highly unlikely that such evidence would be available even if the law were extremely burdensome. For women for whom making two trips would pose a substantial obstacle to obtaining an abortion, the same factors (plus the later birth of a child) make it unlikely that they would step forward to testify about those burdens. A more realistic alternative is to wait for the law to take effect and then to show through statistical and other circumstantial evidence that the burdens of the law have significantly reduced the rate of abortions that women would otherwise choose to have. *Casey* itself alluded to this possibility, but such proof is not a simple proposition. The statistical analysis must show that other variables do not explain a drop in the rate of abortions, and there must also be evidence as to the reasons the law caused the effect. *Casey* allows states to regulate abortions in an attempt to persuade women not to have them. Parties challenging a disclosure and waiting period law must therefore show, under *Casey*, that a significant drop in the

incidence of abortion is the result not of any persuasive effect the law has but of the burdens it imposes on some women.

If a law does in fact impose substantial burdens on women's right to choose, this approach—waiting for the law to take effect and for its practical effects to be reasonably clear from statistical analysis—inflicts irreparable harm on those women who are prevented from having abortions in the interim. In this case, plaintiffs have taken a different approach to avoid this prospect. They brought this facial challenge before the Indiana law could take effect. They seek to prove the likely effects of the law in Indiana by proving the actual effects of a very similar law elsewhere (Mississippi). They have also offered evidence that there is no reason to expect Indiana's experience to be materially different from Mississippi's, and there is no substantial evidence to the contrary.

Defendants have criticized this approach as making "a mockery of the rule of law and *stare decisis*" and inviting a "jurisprudence of caprice." Def. Br. at 15. They say this approach would "require finding not only that a rule that is perfectly legal in one state would violate the Constitution in another, but that a rule invalid in a state one day could, on the next, with a better evidentiary presentation, be found consistent with the Constitution." *Id.* These criticisms echo the *Casey* dissent's attack on the undue burden standard. See 112 S. Ct. at 2879-80 (Scalia, J.). They do not show, however, that plaintiffs' approach is inconsistent with the governing undue burden standard as articulated and applied in *Casey*, focusing on the likely practical effects of the law. Plaintiffs' attempt to prove through statistical and other evidence the likely effects of the Indiana law is entirely consistent, at least in theory, with the undue burden standard as set forth and applied in *Casey*. Whether plaintiffs have come forward with sufficient evidence to show a reasonable

likelihood of prevailing is the question to be addressed next.[3]

B. Effects of Mandatory Disclosure and Waiting Period

Plaintiffs argue that the mandatory disclosure of information and the 18-hour waiting period imposed by Public Law 187 will put undue burdens on a woman's right to choose to have an abortion. They contend the information that must be disclosed to a woman is unnecessary and possibly misleading. They assert that the 18-hour waiting period will cause longer delays in actual practice, making abortions more difficult to obtain and, in some cases, more dangerous and expensive. Plaintiffs focus most of their attack, however, on the "in the presence" provision, which requires that some of the information be provided to the woman in her presence, at least 18 hours before the abortion, effectively requiring most women to make two trips to a clinic.

To attack the mandatory disclosure and waiting period requirements, plaintiffs offered testimony from Dr. Stanley K. Henshaw, a researcher at the Alan Guttmacher Institute; from two Indiana clinic directors, Jane Stout and Marne Greening; and from a clinic director from North Dakota, Jane Bovard. Plaintiffs also rely on a number of affidavits submitted with their motion, including an affidavit from Dr. Connie L. Best, a clinical psychologist who is an expert on the subjects of domestic violence, sexual assault, and rape. Other affiants include the directors and other employees of

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[3] This court recognizes that the Fifth Circuit upheld the Mississippi law because *Casey* was controlling. *Barnes v. Moore*, 970 F.2d 12 (5th Cir.1992). That decision was made before the law had taken effect, and thus before evidence of its actual effects was available.

the plaintiff clinics.[4] Plaintiffs' evidence describes the services and counseling they provide their patients, the types of problems and concerns confronting many women who are deciding whether to continue or terminate a pregnancy, their experience with harassment of patients by anti-abortion protesters, and some of the practical consequences of Public Law 187. The court will provide additional detail on plaintiffs' evidence with respect to each specific issue raised.

In support of the disclosure and waiting period requirements, defendants offered evidence summarizing the information provided to the Indiana legislature when it was considering the bill. Witnesses told the legislature that "hundreds" of women who have had abortions in Indiana have claimed they were "misinformed or ill-informed about the risks, complications and alternatives," and later regretted their decisions to have abortions. Several women told the legislature about their own experiences, their beliefs that they should have had additional information, and their later regrets about having abortions. A physician also told the legislature about the physical and emotional complications associated with abortions and the need for informed consent. The defendants' evidence about information provided to the legislature was not admitted for the truth of the matters asserted, but for the limited purpose of showing some of the information the legislature considered. That information is relevant to the purpose prong of the *Casey* undue burden standard and to whether the legislation bears a rational relationship to a legitimate state purpose.

Two women testified at the court hearing concerning their own experiences, and their testimony was admitted to show the truth of the matters asserted. Marilyn Dowden testified that she had an abortion in 1978 and was not given

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[4] By separate order today the court has ruled on numerous objections to portions of certain affidavits.

accurate information about her options or fetal development in the early stages of pregnancy. She regrets her decision to have an abortion. She also now counsels women after abortions. She testified that the women she counsels experience feelings of guilt, depression, and low self-esteem after having abortions. Delores Brents Huddleson testified about having two abortions in approximately the mid-1970s, which she regrets, and about her experiences that led her to believe she had been pushed into having those abortions without sufficient information or consideration of her alternatives. Defendants did not come forward with any evidence tending to show that women having abortions in Indiana today would actually make different decisions (or would feel their same decisions were better-informed) if Public Law 187 were in effect.

The court will consider in turn the key provisions of the Indiana law: the mandatory disclosure itself, the 18-hour delay requirement, the requirement that some of the medical information be provided by a physician or other health care professional, and the "in the presence" requirement.

1. The Mandatory Disclosures

Indiana law has long required a patient to give her informed consent before she has an abortion. The evidence shows that plaintiffs' current counseling practices are designed to ensure that women are both aware of their options and sure of their decision before they have abortions. Women who indicate any ambivalence about their decision receive additional counseling and, if necessary, as much time as they need to think further about their decision. The evidence presented thus far shows that the vast majority of women who schedule an appointment for an abortion and arrive at the clinic are already aware of their options and believe they have given their choice sufficient thought. There is no evidence showing that those women who are not aware of their options or who are not sure of their decision

are being pushed into having abortions they do not want. There is no evidence that any patients who have had abortions at the plaintiff clinics have later complained that they had insufficient information or were pushed into having abortions without adequate time for reflection.

The testimony of Ms. Dowden and Ms. Huddleson about their own experiences many years ago paints a picture different from plaintiffs' evidence about their current counseling practices. Both Ms. Dowden and Ms. Huddleson had understandable difficulty testifying here about exactly what they were told and what they understood many years ago. Assuming they were actually pushed into having abortions with inadequate information, that evidence does not overcome plaintiffs' evidence about counseling practices today. Ms. Dowden testified that women she counsels are upset and have feelings of guilt and depression after abortions. It is not surprising that some women have later regrets over what can be a difficult decision for many women. Regrets and second thoughts about important and difficult decisions are not unusual, even when the decisions are made with ample information and plenty of time for thought. Without more, the evidence of some women's later regret does not show that any of these women actually made their decisions without important information or adequate time for thought.

Most of the evidence in the record concerning the practical effects of the new law's informational requirements comes from Jane Bovard, director of the only clinic in North Dakota where abortions are performed regularly. North Dakota has a mandatory disclosure and delay law similar to Indiana's, except that it has been interpreted to permit the information to be given over the telephone. Ms. Bovard testified that she provides the required information to women calling for appointments, that "a lot of times they're impatient when we give them the information," and that

when "we get to the section where we have to tell them about medical assistance and the man supporting the child, at least half our patients laugh." Tr. 269. She estimated that in her experience, about one to two percent of women who call ask to receive the state-provided written materials on fetal development and alternatives to abortion. The vast majority of women have no questions about the information they are given. No patient has ever told Ms. Bovard that she was cancelling her plans or changing her decision because of the mandated information.

Based on all this evidence, plaintiffs contend that the informational requirements of Public Law 187 are demeaning and patronizing, and are at best useless for most women who will be required to listen to the information. Under the joint opinion in *Casey*, however, these circumstances do not show an "undue burden." The joint opinion in *Casey* allows a state to express its preference for childbirth through "truthful and not misleading" information and to legislate for the minority of women who are ambivalent about their decisions. 505 U.S. at 881-85, 112 S. Ct. at 2823-25. The information required by Public Law 187 can be provided in as little as five minutes. While the information may be useless for most women who must listen to it, there is no evidence that the requirement that they listen will itself actually impose a substantial obstacle or an undue burden in the sense that the law will be so burdensome as to prevent women from having

abortions they would otherwise choose to have. See *Casey*, 505 U.S. at 881-85, 112 S. Ct. at 2823-24 (joint opinion).[5]

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[5] Justice Stevens asserted in *Casey* that the Court should not decide whether a restriction imposes an "undue" burden without considering the extent of any actual benefits of the restriction. 112 S. Ct. at 2843. He suggested that "the future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation...." *Id.* at 2843 n. 6. Several commentators have suggested that the joint opinion in *Casey* did not intend to treat "purpose" and "effects" as two entirely separate tests for its undue burden analysis. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 Hastings L.J. 867, 887-92 (1994); Sandra L. Tholen & Lisa Baird, *Con Law Is As Con Law* Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts, 28 Loy. L.A. L. Rev. 971 (1995) (text accompanying notes 101-04). These commentators and at least one other have suggested that "undue burden" analysis in abortion cases should balance burdens against benefits to at least some degree (although they do not suggest that any precise weighing is necessary). They argue that such an approach would be more consistent with "undue burden" analysis in other areas of constitutional law where the extent of any benefits may be considered. See Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 Colum.L.Rev. 2025, 2077-89 (1994); Brownstein, 45 Hastings L.J. at 891-92; Tholen & Baird, 28 Loy. L. A. L. Rev. 971 (text accompanying notes 93-126). This court must follow the joint opinion in *Casey*. This court reads that opinion as calling for separate consideration of purpose and effect, and as not considering the extent of any genuine benefits from a restriction, at least so long as the restriction appears to have a legitimate purpose and will not prevent women from exercising their right to choose. That seems to be one of the key points of disagreement between the joint opinion and Justice Stevens' opinion. The subsequent history of *Casey* itself, however, suggests that as district courts makes their factual findings in these cases, they should keep in mind possible developments in the constitutional standards. See *Planned Parenthood v. Casey*, 822 F. Supp. 227 (E.D.Pa.1993) (allowing presentation of additional evidence to apply "undue burden" standard), *rev'd*, 14 F.3d 848 (3d Cir.1994), *stay denied*, 510 U.S. 1309, 114 S. Ct. 909 (1994) (Souter, J., in chambers).

Plaintiffs also suggest that the required information about available medical assistance and child support may be misleading to women. Public Law 187 requires that a woman be informed only that "medical assistance benefits may be available" and that the father of the unborn fetus is "*legally required* to assist in the support of the child." Ind. Code § 16-34-2-1.1(2) (emphasis added). No one claims that this information provides a complete picture of relevant facts on either of these issues. However, the law does not forbid anyone from providing additional information about either the eligibility criteria for medical assistance or the practical realities of collecting child support from fathers. If the law were to require a more complete picture on these issues, its requirements would become more burdensome and time-consuming. Under *Casey*, the legislature may constitutionally require that these subjects be raised with the pregnant woman without requiring additional detail in all cases. Under *Casey*, therefore, the plaintiffs appear unlikely to show that the information requirement itself imposes an undue burden on a woman's right to choose whether to continue or terminate her pregnancy.

2. The 18-Hour Delay

Plaintiffs have expressed more of a concern about the practical effects of the 18-hour delay requirement. The evidence shows that abortions are ordinarily performed only one or two days a week at most Indiana clinics. The required 18-hour delay therefore will often result in actual delays of several days or perhaps even a week or two. In some cases, these delays may cause what would have been a safer and less expensive first trimester abortion to become a riskier and more expensive second trimester abortion. (After the eighth week of pregnancy, the medical risks of abortion, which are very low, especially in the earliest stages of pregnancy, rise by about 20 percent per week.) However, the evidence also shows that most women seeking abortions in Indiana

schedule their appointments in advance, usually by telephone. It is very unusual to have an abortion procedure performed the same day the woman first contacts a clinic. Accordingly, apart from the "in the presence" requirement, if the information required by Public Law 187 could be provided when a woman first makes contact with a clinic, the 18-hour delay would rarely add to delays that women already encounter as a matter of scheduling and logistics.

There is no evidence before the court showing that women would actually benefit from this waiting period mandated by law. *Cf. Casey*, 505 U.S. at 920, 112 S. Ct. at 2843 (Stevens, J., dissenting in part) (courts should consider actual benefits of law in applying undue burden standard). There is evidence that some women later regret their decisions. That evidence is not surprising in view of the fact that a decision to have an abortion is important and can be difficult for many women. But that evidence does not prove either that these women's decisions would probably have been different or that they would have regretted them less if they had been subject to a mandatory waiting period. The only evidence about current practices of Indiana abortion clinics indicates that the clinics already take steps to ensure that women are aware of their alternatives and have made a considered decision before they have abortions. There is no evidence that women who are ambivalent are now having abortions without taking time for further reflection.

Under *Casey*, the apparent lack of genuine benefit does not mean that the waiting period amounts to an undue burden. There is no evidence, beyond the types of evidence found insufficient in *Casey*, that the 18-hour delay in itself would prevent a substantial number of women from having abortions they would otherwise choose to have. Thus, the delay itself does not appear to be an undue burden. This conclusion is consistent with decisions of other courts upholding brief waiting periods after *Casey*. *E.g.*, *Planned*

Parenthood, Sioux Falls Clinic, Inc. v. Miller, 63 F.3d 1452, 1467 (8th Cir.1995); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir.1994); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1491, 1495 (D.Utah 1994).[6]

3. Role of the Physician or Health Care Professional

Public Law 187 requires that some of the medical information be provided by a referring physician, the physician who is to perform the abortion, or a physician assistant, advanced practice nurse, or midwife. This provision of Indiana's law is somewhat less restrictive than the Pennsylvania law in *Casey*, which required that the information be provided by a physician. The Supreme Court upheld that requirement since there was "no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion." 505 U.S. at 884, 112 S. Ct. at 2824.

Plaintiffs have raised concerns here about the scarcity of physician time and the expense and difficulty of hiring others who qualify under the Indiana statute. There are only eight physicians in Indiana who regularly perform abortions. Plaintiffs contend there is only a small number of other health care professionals who are both (a) qualified to provide medical information required by Public Law 187 and (b) willing to do so. There is also no evidence before the

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[6] This form of analysis focuses on the effects of a particular restriction on abortions, considered in isolation. The joint opinion in *Casey* did not indicate whether or how it might be possible to prove that a state has imposed an undue burden on a woman's right to choose through the cumulative effect of many restrictions which may each serve a legitimate purpose, but only to a marginal degree. *Cf. Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 527, 110 S. Ct. 2972, 2985-86, 111 L. Ed. 2d 405 (1990) (Blackmun, J., dissenting); see also Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U.Pa.L.Rev. 83, 99-103 (1989).

court showing any substantial benefit from the law's limits on who may provide the information. See *Casey*, 505 U.S. at 920, 112 S. Ct. at 2843 (Stevens, J., dissenting in part) (courts should consider actual benefits in determining whether law imposes an undue burden). To the contrary, the evidence before the court shows that the counselors at the plaintiff clinics are well-trained and well-qualified to counsel patients on the required subjects, including medical information. However, the joint opinion in *Casey* shows that increased cost and inconvenience, apparently even for little or no actual benefit, do not establish an undue burden in the sense that the law would actually prevent women from having abortions they would choose to have. Thus, there is no evidence on this record that the Indiana law's limitation on who may provide the medical information is likely, in practical terms, to amount to a substantial obstacle. *Cf. Armstrong v. Mazurek*, No. CV-95-083-GF, slip op. at 13 (D. Mont. Sept. 29, 1995) (denying preliminary injunction against enforcement of statute that requires an abortion to be performed only by a licensed physician).

4. The "In the Presence" Requirement

Plaintiffs have directed their strongest attack against the requirement in Public Law 187 that some of the information be provided "in the presence of the pregnant woman."[7] Plaintiffs contend that the practical effect of this provision would be to require women seeking an abortion to make two trips to a clinic. For many women, making two trips would make abortions more expensive and less convenient, but they would still be able to obtain them. However, plaintiffs contend that for many other women, the practical difficulties

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[7] The information the statute requires to be delivered in person relates to fetal development and medical risk. See Ind. Code § 16-34-2- 1.1(1). The statute permits information concerning child support, medical assistance, and adoption alternatives to be delivered "orally," which could include by telephone. See Ind. Code § 16-34-2-1.1(1) & (2).

of arranging to be away from families or partners, jobs or classes, would actually prevent them from obtaining abortions they would otherwise choose to have. Plaintiffs express special concern about women in abusive or potentially abusive relationships who feel they must conceal from their husbands or partners the fact that they are having an abortion. The affidavit of Dr. Connie L. Best provides disturbing evidence concerning the extent of domestic violence and especially the extent of violence directed at some pregnant women and their children. Dr. Best points out that it can be very difficult for women in abusive relationships to make even one undetected trip to an abortion clinic, let alone two, and that the prospect of the second trip increases the risk of discovery and further abuse. See also *Casey*, 505 U.S. at 887-93, 112 S. Ct. at 2826-29 (striking down spousal notification requirement based on risk of abuse resulting from spouse's awareness of pregnancy and planned abortion). Plaintiffs have also submitted extensive evidence at the hearing and by affidavit concerning the variety of harassing tactics used at their clinics by anti-abortion protesters. Some of those tactics include photographing patients, tracing license plates, and the like. Plaintiffs assert that women required to make two trips to clinics would be vulnerable to abuse and harassment (and unwanted disclosure to abusive partners or others) after the first visit. Plaintiffs contend that for a significant number of women, these obstacles and risks would be so great that women will forego abortions they would otherwise choose to have.

Defendants point out that the Indiana statute does not actually require two trips to a clinic because the information may be provided by a referring physician. However, as a practical matter, very few women seeking abortions are referred by other physicians. Plaintiffs' Exhibit 25 shows that over a thirteen month period, approximately four percent of one Indiana clinic's patients were referred by an outside physician. For purposes of evaluating the law's practical

effects, the "in the presence" requirement in the law amounts to a requirement that women make two trips to a clinic.

The Supreme Court assumed that the Pennsylvania statute upheld in *Casey* would require two visits. The statute required that at least 24 hours before the abortion, the physician who is to perform the abortion or the referring physician must have "orally informed the woman" of certain medical information. See 505 U.S. at 902, 112 S. Ct. at 2833. The district court in *Casey* interpreted this language as requiring that the information be provided in the woman's physical presence. That court found that the requirement would subject many women to harassment and hostility; would double travel time and increase costs for travel, lost wages, babysitting, and related expenses; and would be especially burdensome for women having difficulty explaining their absences, such as battered women, school age women, and working women without sick leave. 744 F. Supp. at 1351-52. The Supreme Court described these findings as "troubling in some respects," but held that they did not demonstrate that the law would impose an undue burden. 505 U.S. at 885-86, 112 S. Ct. at 2825. As a result, *Casey* established that a facial challenge to a two-trip law cannot succeed without evidence beyond that presented in *Casey*.

Plaintiffs argue that the experience in other states with similar laws that have taken effect since *Casey* was decided provides sufficient evidence to establish that the Indiana law's "in the presence" requirement would impose an undue burden. The centerpiece of plaintiffs' proof at this stage of the case is a study done by Dr. Stanley K. Henshaw about the effects of a similar law in Mississippi.[8] According to

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[8] Dr. Henshaw is deputy director of research at the Alan Guttmacher Institute in New York. He has a doctorate in sociology. Most of his professional work concerns quantitative statistical studies related to pregnancy, abortion, and reproductive health services.

plaintiffs, Mississippi is the only state where a law with a two-trip requirement has been in effect long enough so that data have been available to evaluate the law's effects. The Mississippi law imposes disclosure and delay requirements similar to Indiana's, although the delay is for 24 hours. The law does not explicitly require that the information be given in the presence of the woman, but it has been interpreted and applied that way.

Plaintiffs argue that the experience of women in Mississippi provides good evidence—in fact the best available evidence—of the likely effects of the Indiana law. Dr. Henshaw testified that while there might be some difference in degree, he believes that Indiana and Mississippi are sufficiently similar to expect similar effects from the two laws. The parties have not brought to the court's attention any significant differences between the populations of the two states or other factors that would affect the provision of abortion services. The Mississippi study therefore deserves close scrutiny here.

The Mississippi law took effect on August 8, 1992. Dr. Henshaw reviewed statistical data on abortions provided in Mississippi (both to Mississippi residents and residents of other states), as well as data from Alabama and Tennessee, where some women from Mississippi go to obtain abortions. He did not have data available from Louisiana and Arkansas. In his published study (admitted as Plaintiffs' Exhibit 3), Dr. Henshaw calculated the number of abortions that Mississippi residents would have been expected to obtain from August 1992 to December 1992, and he calculated the number that they actually obtained. His calculations showed the following:

	Expected	Actual	Percent Difference
Abortions performed in MS	3,263	2,537	-22%
MS residents having abortions in AL and TN	576	673	+17%
Out-of-state residents having abortions in MS	787	550	-30%
MS residents having abortions in MS, AL, and TN	3,052	2,660	-13%
MS residents having abortions before 9 weeks of gestation	1.624	1,224	-25%
MS residents having abortions after 12 weeks of gestation	310	319	+3%

The data thus shows that the number of Mississippi residents obtaining abortions in Mississippi, Alabama, and Tennessee dropped by 13 percent from the expected level calculated by Dr. Henshaw. He also calculated that if the number of Mississippi residents obtaining abortions in Louisiana increased to the same extent that the numbers for Tennessee and Alabama did, the overall drop from expected to actual would be 11 percent.[9] Both Dr. Henshaw and defendants' expert, Dr. Steele, agreed that that number is statistically

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[9] Dr. Henshaw appears not to have addressed the possibility that Mississippi women obtained more abortions in Arkansas, the fourth state bordering Mississippi, but defendants have not pressed the point. The court will not speculate about the matter but will limit its evaluation to the evidence actually presented.

significant, meaning that the chance that the drop was merely a random fluctuation in the abortion rate is very small. Dr. Henshaw calculated that there was less than one chance in one thousand that this drop was the result of random fluctuations. Pl. Ex. 3.

Dr. Henshaw also found that the number of Mississippi women obtaining abortions earlier than 9 weeks into their pregnancies (and thus at the earliest and safest stage) dropped by 25 percent, or more than the overall drop. He found that the number of abortions after 12 weeks (the first trimester) stayed approximately the same, meaning that, with the overall drop in numbers, the *proportion* of abortions after 12 weeks increased from 10.3 percent to 12.1 percent.

The study was published in September 1994. At the preliminary injunction hearing, Dr. Henshaw testified about updated information on Mississippi. He had analyzed data from 1991, 1992, and 1993, which provided a broader statistical base for analysis. The results are summarized in Plaintiffs' Exhibit 4. Using 1991 as a base year, the additional data show that after the new law took effect, the number of abortions obtained by Mississippi residents and performed in Mississippi dropped by 24.9 percent. The number of Mississippi residents traveling to Alabama and Tennessee for abortions increased by 22.2 percent. Thus, the additional data show that the total number of abortions obtained by Mississippi residents after the law took effect (whether in Mississippi, Alabama, or Tennessee) decreased by 16 percent. With an estimated adjustment for women going to Louisiana for abortions, the relevant decrease was 14 percent. The proportion of abortions for Mississippi residents before 9 weeks dropped by 14.8 percent, and the proportion of abortions for Mississippi residents after 12 weeks increased by 22.1 percent. Dr. Henshaw found that these changes were all statistically significant, meaning again

that it is highly unlikely that they were the result of mere random fluctuations in abortion rates.[10]

Dr. Henshaw looked for factors other than the new law that might explain these changes. The possibilities he considered were long-term trends in abortion rates, changes in abortion providers or prices in Mississippi, and changes in the population of women of child-bearing age in Mississippi. He looked at longer-term data from Mississippi and surrounding states and determined that the significant drop was not part of a longer-term decline in abortion rates. He obtained information about abortion providers and prices in Mississippi and found no change in the relevant time period that could explain the drop. He also found no change in the population of women of child-bearing age in Mississippi. After doing his analysis, he concluded that he was "95 percent convinced" that the new Mississippi law accounted for the significant changes in abortion rates and patterns that he observed. For reasons discussed below in more detail, he also concluded that this effect of the law was not the result of Mississippi women receiving the mandated information, waiting for the required period, and then changing their minds about having abortions.

Defendants agree that the Mississippi data show a statistically significant drop in abortion rates for Mississippi residents. They dispute Dr. Henshaw's conclusions about the reasons for the drop, and they have attacked Dr. Henshaw's study on two different levels. First, they contend that Dr. Henshaw committed methodological errors that undermine the reliability of his statistical analysis and his conclusion that the law caused the drop in the abortion rate. Second, they attack most vigorously Dr. Henshaw's claim that the

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[10] All of these data were significant at a level of at least 95 percent, and most to higher degrees of significance. See Pl. Ex. 4 (values of "p" ranging from less than 0.05 to less than 0.001).

Mississippi law had these effects not because of the persuasive power of the information and waiting period, but because of the burdens it imposes on women seeking abortions.

Dr. Gregory Steele, the state epidemiologist for the Indiana State Department of Health, evaluated Dr. Henshaw's study for defendants.[11] Dr. Steele criticized Dr. Henshaw's methodology on several grounds. First, he argued that Dr. Henshaw did not account properly for seasonal variations in abortion rates in calculating the expected numbers that were the basis for his comparisons after the new law took effect. Dr. Henshaw developed his "expected" data by starting with the actual data for the period January 1992 to July 1992, the period just before the law took effect, and multiplying those figures by 65 percent.[12] Dr. Henshaw supported the 65 percent figure in two ways. First, he looked at actual abortion rates in Mississippi in 1990, 1991, and 1993, and found that the number from August to December of each year averaged 65.029 percent of the number from January to July of the same year. He also looked at national data from 1986 and 1988, which showed ratios of 65.456 percent and 65.220 percent, respectively.

Dr. Steele argued first that Dr. Henshaw should have "normalized" his data for the seasonal variations in a different way, using logarithms of monthly figures as a way of smoothing out the monthly variations. However, Dr.

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[11] Dr. Steele has a doctorate in public health. The focus of his professional work for many years has been work with health statistics of a wide variety, including data on pregnancy, births, and abortions.

[12] If abortions were evenly distributed among months, the ratio would be 71.429 percent. Because abortion rates are generally slightly higher in the early months of the year, decline in late summer and fall, and increase again in November or December, some seasonal adjustment is necessary for use of partial-year data.

Steele had not actually performed such an analysis with logarithms and therefore could not comment on how his preferred method of seasonal adjustment or normalizing would affect the results of the study. While there are several different ways for statisticians to deal with such seasonal variations, Dr. Steele's testimony did not persuade the court that Dr. Henshaw's failure to use the logarithm technique that Dr. Steele advocated undermines the study or its conclusions.

Dr. Steele sharply criticized Dr. Henshaw for having used 1993 data in calculating these seasonal variations. Dr. Steele testified that use of any data from the time after the intervention being evaluated, *i.e.*, after the new law took effect, would contaminate the results of the analysis. That analysis depends on a comparison of actual and expected events after the intervention. The court believes it understands Dr. Steele's concern on this point but is not yet persuaded that this factor had any material influence on the results of Dr. Henshaw's study. Dr. Henshaw used the "contaminating" 1993 data for only one purpose—calculating the average ratio of August to December abortions to the number of January to July abortions in Mississippi. The result of that calculation, 65.029 percent, was very close to the ratio developed from the national data (65.456 percent and 65.220 percent), which suggests that the 65 percent figure was reasonably accurate despite the asserted methodological error. In addition, Dr. Steele did not do comparable calculations without the 1993 data to evaluate the extent to which the 1993 data might have affected the result.[13] Finally, there is no evidence before the court suggesting that the Mississippi law would have had any impact on the seasonal variations of abortion rates in

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[13] In their post-hearing reply brief defendants included a table of ratios they had calculated for the years 1987-1994, but that table is not meaningful without further analysis and calculations of the sensitivity of Dr. Henshaw's conclusions to such changes.

Mississippi. Thus, the court does not believe Dr. Henshaw's conclusions are undermined by his use of the 1993 data for this limited purpose.

Dr. Steele also criticized Dr. Henshaw's Chi-square calculations on several grounds.[14] This testimony was based largely on his analysis of a handwritten set of calculations (Def. Ex. 10) that were not explained by either side. The court is left to wonder just what the asserted problems were. In any event, Dr. Steele did not test Dr. Henshaw's Chi-square calculations by doing his own calculations. Accordingly, the court does not give these criticisms of the Chi-square calculations any weight based on this record.[15]

More relevant are Dr. Steele's attacks on Dr. Henshaw's conclusions drawn from the data. Dr. Steele said that Dr. Henshaw did not sufficiently consider other explanations for the changes in the Mississippi abortion rates. Dr. Steele contended the drop could have been part of a larger trend in declining abortion rates. As noted, however, Dr. Henshaw looked at Mississippi and data from other states in the region, and the data did not indicate there was any larger trend at

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[14] Chi-square calculations are mathematical tests to determine the extent to which differences between expected and observed phenomena are likely to have been the result of random chance. Such calculations provide one basis for concluding whether a difference between expected and observed phenomena is "statistically significant," which can be quantified in several ways. See generally Federal Judicial Center, Reference Manual on Scientific Evidence 378-81 (1995).

[15] The court is concerned, however, about Dr. Steele's testimony that he had thus far been unable to duplicate some of Dr. Henshaw's calculations. The testimony of both witnesses at the preliminary injunction hearing had been prepared under significant time pressure, so there may not have been adequate time to iron out any apparent discrepancies in the arithmetic. If necessary, the court will take appropriate steps through the discovery process in preparing for the trial on the merits to ensure that the data and calculations of experts on each side are readily accessible to the other side.

work to explain the sharp drop in Mississippi in 1992. Dr. Steele raised several other questions about Dr. Henshaw's study and the conclusions to be drawn from it. Dr. Steele noted that data from the Centers for Disease Control showed a 4.5 percent drop in the pregnancy rate for Mississippi teenagers from 1991 to 1992, and he suggested that could explain part of the decrease in abortions observed by Dr. Henshaw. He noted that Dr. Henshaw's own data do not show any correlation between the drop in Mississippi abortion rates and the age, race, educational level of women, or with their distance from an abortion provider. [16] He also noted, as did Dr. Henshaw, that while the abortion rate dropped by about 11 percent for women in Mississippi, the birth rate for the same cohort of pregnancies also dropped by 1.3 percent, instead of increasing by about 1.5 percent, as would have been expected from the drop in abortions.

Neither Dr. Henshaw nor Dr. Steele was able to explain these phenomena, but there is also no real indication that they undermine Dr. Henshaw's conclusions. Dr. Steele agreed with Dr. Henshaw that the drop in Mississippi abortion rates was statistically significant. He also agreed that the two- trip requirement in the Mississippi law could be burdensome and could have accounted for the decline. He did not agree with Dr. Henshaw that the available evidence allowed a reliable conclusion that the law caused the change, but he also did not point to any evidence that actually tends to refute Dr. Henshaw's conclusion.

Accordingly, the court finds that plaintiffs have established a reasonable likelihood of showing that the Mississippi law caused a drop of 11 to 14 percent in the

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[16] Dr. Henshaw's initial study of the 1992 data showed that the drop in abortion rates appeared greater for women with less than a high school education. That correlation did not appear in the later study looking at data from 1991, 1992, and 1993. See Pl. Ex. 4.

number of Mississippi women obtaining abortions, and that Public Law 187 is likely to have a comparable effect in Indiana. While the number cannot be calculated precisely, that is a significant fraction of women who would otherwise choose to have abortions. The magnitude of the effect therefore appears sufficient to satisfy the undue burden test as set forth in *Casey*. See 505 U.S. at 896, 112 S. Ct. at 2830.

However, plaintiffs must also show *why* the Mississippi law had this effect. Both the Indiana and Mississippi laws appear to have been enacted in the hope that they would reduce the number of abortions. *Casey* instructs that such laws and such effects may be constitutional if they reduce the number of abortions by providing women with more information and requiring them to continue considering their decisions for a brief time after they receive that information. If the persuasive effects of the law reduce the number of abortions, that result is perfectly consistent with *Casey*, which held that a state may impose such requirements in order to encourage childbirth over abortion, and to ensure that a woman's decision is informed and well-considered. If, on the other hand, the law causes a drop in abortions by making it more difficult to obtain an abortion, the law may impose an "undue burden" that is unconstitutional under *Casey*.

Dr. Henshaw testified that in his opinion, the Mississippi law caused the decline in abortion rates because of burdensome effects rather than persuasive effects. He based that conclusion primarily on two factors. First, as reported in his published study, he asked the directors of two of the three abortion providers in Mississippi at that time whether women were changing their minds after coming for an initial visit and receiving the initial counseling. He testified: "They both responded that it was quite rare for women to change their minds and not return; that if women came for the first

visit, they almost invariably returned for the procedure. They didn't see a change in women changing their minds as a result of the—excuse me, after the law went into effect." Tr. 28. Second, Dr. Henshaw noted the 17 percent increase in the number of Mississippi women going to other states to have abortions and the 30 percent decrease in the number of women from other states coming to Mississippi to have abortions. Those substantial changes cannot be explained by the persuasive effects of the Mississippi law. They indicate that women are going to less convenient clinics in order to avoid the inconvenience of the Mississippi law.

The evidence on this issue is not limited to Dr. Henshaw's opinion and the Mississippi data. The experience under North Dakota's disclosure and delay law also tends to indicate that the Mississippi law's effect is a result of burdens rather than persuasion. Jane Bovard, the director of the only clinic in North Dakota, explained that the North Dakota law permits the information to be provided by telephone. See also *Fargo Women's Health Org. v. Schafer*, 18 F.3d at 530-32. When a woman calls to schedule an appointment for an abortion, the woman is told the state-mandated information. As noted above, Ms. Bovard estimated that only one or two percent of women ask for the additional state-provided written materials that must be offered, and she said that no patient has ever told her she was going to cancel her

appointment because of the information provided. She has seen no decrease in the number of abortions provided.[17]

Also highly relevant here is the complete absence of any evidence suggesting that similar disclosure and delay laws in any states actually have the constitutionally permissible persuasive effect on women. As discussed elsewhere in this opinion, defendants have shown that there exists information upon which a rational legislature could rely suggesting that such laws may produce some benefits. Since *Casey* was decided, similar laws have taken effect in several states without two-trip requirements. There is no evidence before this court indicating that these laws are persuading women not to have abortions or that the additional time for reflection is changing any women's minds.

Plaintiffs' evidence about the ways in which the two-trip requirement could prevent women from having abortions is also relevant here. Plaintiffs provided substantial evidence, particularly from the affidavit of Dr. Connie L. Best, about behavior of men and women in abusive relationships. She testified that men who subject women to violence and abuse often subject them to surveillance and use other tactics to keep them under control. She also testified that men who abuse their wives or partners often escalate the abuse when the woman becomes pregnant. Those forms of behavior make it very difficult for some abused women to make even one trip to an abortion clinic, let alone two, because the result

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[17] The North Dakota law took effect on March 17, 1994. Ms. Bovard presented data showing the number of abortions her clinic provided from January to September of 1993, 1994, and 1995. Pl. Ex. 29. The numbers are virtually identical. Defendants say that the North Dakota statistics are "crude" and that the numbers can be analyzed in different ways such that it is possible the North Dakota law caused a slight decline in the abortion rate. The North Dakota data have not yet been subjected to even the limited analysis performed on the Mississippi data. The parties will have an opportunity to do such analysis before trial.

of the two-trip requirement may be that the man learns of the woman's plan to have an abortion. Dr. Best's affidavit is not enough by itself to show that the two-trip requirement in Indiana will in fact impose an undue burden on a significant number of women, but it provides one reasonable explanation for how a two-trip requirement could prevent a significant number of women from exercising their right to choose. Moreover, that real possibility in many cases is one of the principal foundations for the Supreme Court's decision in *Casey* to strike down the spousal notification law. 112 S. Ct. at 2826-30. As the Supreme Court explained:

> For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamountto the veto found unconstitutional in [*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976)]. The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

Id. at 2831.[18]

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[18] This portion of *Casey* illustrates the issue plaintiffs face. A spousal notice law like Pennsylvania's could conceivably reduce the incidence of abortion by causing husbands and wives to talk about the decision and reach joint decisions that would be different from the wives' initial decisions. That result would be permissible under *Casey*, but the Supreme Court's decision to strike down the spousal notice law shows that the Court concluded that scenario was unlikely. The evidence

Defendants objected to Dr. Henshaw's opinion about the law's burdens causing the drop in the Mississippi abortion rate, and Dr. Steele criticized Dr. Henshaw for relying on the information provided by the two clinic directors in reaching any conclusions. Dr. Henshaw explained that in his studies, he and other researchers often rely on information supplied by providers of abortion services. On cross-examination, he explained why he considered the providers' statements that very few women failed to return after receiving the state-required information sufficiently reliable to use in his study. He said that is the type of information that should be objectively verifiable. The clinics should have records on whether or not women come back, their actions have economic consequences for the facilities, and such actions would cause inconvenience to the clinics such that the directors should be aware of the extent of such actions. Tr. 89-90.

Defendants contend Dr. Henshaw's opinion on this issue fails to satisfy *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), in which the Supreme Court instructed district judges to act as "gatekeepers" concerning scientific testimony. In considering the admissibility of proffered scientific testimony, the court should consider several factors: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the "general acceptance" of the theory. *Bradley v. Brown*, 42 F.3d 434, 437 (7th Cir.1994). This list of factors is not exhaustive, and some of these factors may not be readily applicable in all cases, such as

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concerning abusive relationships appears to have played an important role in convincing the Supreme Court that the likely decrease in the incidence of abortion caused by the spousal notice law was unlikely to result from a woman changing her mind after a constructive dialogue, mandated by the state law, with her husband.

those involving social science opinions. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 & n. 4 (9th Cir.1995) (on remand) (list of factors illustrative rather than exhaustive, and factors may not be equally applicable, or applicable at all, in every case); *In re Aluminum Phosphide Antitrust Litigation*, 893 F. Supp. 1497, 1506 (D. Kan.1995) (each of these factors may not be relevant in determining reliability of social science expert testimony, but *Daubert* requires the court to act as a "gatekeeper" in determining reliability and relevance). The ultimate question is whether the scientific knowledge will assist the trier of fact. Federal Rule of Evidence 702 requires "a grounding in the methods and procedures of science," and "more than subjective belief or unsupported speculation." *Daubert*, 113 S. Ct. at 2795. *Daubert* does not require a scientific opinion to be beyond criticism before it becomes admissible. The Supreme Court instructed lower courts to continue to rely on "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" as the means for dealing with "shaky but admissible evidence." 509 U.S. at 2798.

Upon consideration of these factors, the court concludes that Dr. Henshaw's opinion that the Mississippi law's effects are the result of its burdens rather than it persuasive effects is sufficiently supported to be admissible. Dr. Henshaw did not claim his opinion is the final and definitive word on the subject, nor does the court take it as such. Rather, his opinion is a preliminary scientific opinion reached on the basis of limited but reasonable and objective information. That information includes the dramatic changes in travel for abortions into and out of Mississippi, and no one suggests those changes can be explained by the law having persuasive effects. The information also includes the information from two of three clinic directors in Mississippi, and Dr. Henshaw explained why he and other researchers rely on such information. Other evidence that Dr. Henshaw did not cite

also tends to corroborate his opinion. That evidence includes the data indicating, if not definitively proving, the absence of any persuasive effect from similar information requirements in North Dakota. It includes the *absence* of any evidence showing that any similar laws around the country actually have the type of persuasive effects that give them a constitutionally legitimate purpose under *Casey*. It also includes the evidence concerning behavior in abusive relationships. Similar evidence and similar concerns led the Supreme Court in *Casey* to strike down the spousal notice statute. And while the Supreme Court was not persuaded in *Casey* that a two-trip waiting period law would impose an undue burden, the Court did not have available to it evidence showing that such a law had in fact caused a significant drop in the incidence of abortion. All that information supports the view that the burdens of a two-trip requirement are not merely a figment of Dr. Henshaw's imagination or advocacy. (Dr. Steele conceded the two-trip requirement *could* be burdensome, that the decrease in abortions was statistically significant, and that the decrease could have been caused by the law's burdensome effects.)

To apply the *Daubert* factors: First, Dr. Henshaw's opinion about the burdensome effects of the Mississippi law certainly can be tested and is subject to falsification. If there is one basic characteristic that marks an assertion as "scientific" from one that is not, it is that the assertion must be capable of being proved false.[19] Dr. Henshaw's opinion could be proven incorrect by evidence, for example, that significant numbers of Mississippi residents contemplating

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[19] Judges and other non-scientists often speak of "verifying" scientific claims, see, *e.g.*, *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 615 (7th Cir.1993), but in view of the at least theoretical possibility that even the best established scientific verities could be proven false in the future, it is more accurate to refer to "falsifiability." See *Daubert*, 113 S. Ct. at 2795, 2796-97; *Sierra Club v. Marita*, 46 F.3d 606, 622 (7th Cir.1995).

abortions listen to the state-mandated information and then decide not to have abortions. Evidence that similar law in other states have significant persuasive effects might also tend to disprove Dr. Henshaw's opinion. There may be many other forms of evidence that would disprove Dr. Henshaw's opinion. But there is no evidence now before the court tending to disprove or falsify it.

Second, Dr. Henshaw's opinion has been published by a respected institution in the field, the Alan Guttmacher Institute, but has not yet been subjected to formal peer review. Dr. Henshaw testified that there was a desire not to delay publication. He was also aware his analysis might be used in litigation. As the Ninth Circuit explained in *Daubert* on remand, evidence from a scientist testifying about research that she has done independently of the litigation and that has been subjected to peer review and publication is likely to satisfy the *Daubert* reliability test. See 43 F.3d at 1317-19. These criteria are not indispensable, however. There may be instances, and this appears to be one, where time pressures affect either publication or peer review. See *Daubert*, 113 S. Ct. at 2797; 43 F.3d at 1318 n. 9. Although Dr. Henshaw conducted his research with the realization that it could be relevant to litigation, that fact does not disqualify the evidence concerning a field where litigation is constant and the Supreme Court's opinion in *Casey* amounted to an invitation to conduct such studies. Healthy skepticism about such evidence is necessary, but the evidence should not be excluded because of the connection with the litigation. The court also finds credible Dr. Henshaw's testimony that he was surprised by the results of his research on Mississippi.

Third, the known or potential rate of error factor seems to implicate considerations not directly relevant here, but again, Dr. Henshaw's opinion is certainly falsifiable. Fourth, in terms of general acceptance, the principal challenge is to Dr. Henshaw's reliance on what defendants call "anecdotal

reports of two clinic directors." The characterization as "anecdotal" is not accurate. Dr. Henshaw explained that researchers in his field often rely on information from health care providers, but they do not do so uncritically. He explained why he believed the information from two of three available directors was reliable in this instance. They provided not anecdotes but the fact that they had not observed patient behavior consistent with the law having persuasive effects. Defendants can rightly complain that these observations were not precisely quantified. However, the data show a 22 percent drop in abortions actually performed in Mississippi (a total decrease of more than 700 over a five month period). It is reasonable to conclude that if the law's persuasive effects could account for a drop of that magnitude, the directors would have noticed a significant number of patients visiting once to hear the state-mandated information and then cancelling or not scheduling abortions.[20]

Dr. Henshaw's preliminary opinion that the Mississippi law's effects cannot be attributed to its persuasive effect is reasoned and based on relevant evidence; it is falsifiable (*i.e.*, capable of being disproved); and it is consistent with a great deal of other evidence available to the court. It is highly relevant to a central issue in the case, and it is sufficiently helpful to this trier of fact to consider at this preliminary stage of the case, where the court must make a decision on the best available evidence in the face of

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[20] Defendants make much of Dr. Henshaw's deposition testimony about "speculation" and the limits of his opinion. What Dr. Henshaw could not explain specifically, based on the data he had, is "what was going on in [women's] heads to cause them not to come to have abortion services as the consequence of the law." Tr. 98-99. His opinion that the law's effects are not the result of the required counseling or persuasive effects is not "speculation," regardless of his inability to identify precisely how and why the law's burdens prevent women from having abortions.

threatened irreparable harm. Dr. Steele compared the new law to a clinical drug trial, and he said that "if you're trying a drug and you find out it's harmful, then you should stop using it." Tr. 351. Dr. Henshaw's opinion and the other evidence before the court show a reasonable probability that a two-trip law imposes significant burdens and irreparable harms. Dr. Henshaw's opinion and the other evidence discussed above therefore support the issuance of a preliminary injunction to prevent irreparable harm (*i.e.*, to stop the "clinical trial") at least until the critical issues can be explored in more depth. Whether Dr. Henshaw's opinion would be sufficient to support a final judgment for plaintiffs after a trial on the merits is another question. Before it must be faced, all parties and Dr. Henshaw will have ample opportunity to gather and analyze all available data.[21]

Both Dr. Henshaw and Dr. Steele agreed that a better indicator of the reasons for the drop in abortion rates in Mississippi could be obtained through a study that would interview women who chose to have abortions, women considering abortions who received the state mandated information and then changed their minds, and a sample of women who chose to carry their pregnancies to term. Dr.

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[21] The preliminary character of this decision and the evidence upon which it must be based is illustrated by two episodes in the preliminary injunction hearing. First, through Dr. Steele, defendants offered evidence to show that the incidence of abortions in Indiana, which had not changed its law, had dropped by an amount comparable to the drop in Mississippi at the same time. By the next day it became apparent that the Indiana government data on which this testimony was based came from a year for which the state government had lost much of the relevant records and had then scrambled to reconstruct them as best it could. Defendants therefore withdrew the key exhibit. By the same token, plaintiffs asked the court to leave the hearing record open for a few days so they could have an opportunity to obtain better evidence directly from the Mississippi clinic directors. The court provided that opportunity, which passed without proffer of additional evidence and without explanation.

Henshaw had initially proposed a study that would include some interviews of women obtaining abortions concerning their response to the state- provided information. Dr. Steele said he would prefer such a study interviewing all three groups of women as the basis for drawing any conclusions about the effects of the Mississippi law. Tr. 306-07, 355-57. The court does not doubt that such information could be useful in drawing conclusions with greater certainty about the effects of the Mississippi law. However, Dr. Steele also testified that he was not aware of any ongoing surveys dealing with abortion that used such methods. Such interviews would appear to require either significant invasions of privacy about an extremely sensitive subject or, if researchers relied on voluntary waivers of confidentiality by women, a serious risk of studying non-representative samples. The court has doubts about the ability to conduct such studies reliably where privacy and confidentiality are as important as they obviously are in this context.

The evidence now before the court does not allow anyone to draw *definitive* conclusions about the effects of the Mississippi law or the likely effects of the Indiana law. But this case is before the court on a motion for a preliminary injunction. Plaintiffs need not prove they are certain to prevail on the merits. They must show at this point a reasonable likelihood of prevailing on the merits of this claim. They can prevail ultimately by showing by a preponderance of the evidence the probable effects of the Indiana law. The evidence before the court, which goes well beyond the evidence presented in *Casey* on this issue, shows that the "in the presence" requirement of the Indiana law is likely to have effects in Indiana comparable to the effects of the similar law in Mississippi. That is, the number of Indiana women obtaining abortions is likely to drop by approximately 11 to 14 percent, and this effect is likely to be the result the burdens of the law rather than the persuasive effect of the required information and delay. That effect

means that for a large fraction of women seeking abortions, the law is likely to operate as a substantial obstacle to a woman's choice to undergo an abortion. Under *Casey*, therefore, the "in the presence" requirement of the Indiana law appears reasonably likely to impose an undue burden that is unconstitutional.

These conclusions at this stage of the case are necessarily based on incomplete information and are provisional. By the time of trial in this case more information should be available concerning the effects of similar laws— either with or without two-trip requirements—in other states. Because of the prospect of irreparable harm, however, the court is required to make its best judgment now on the basis of the information that is available now, notwithstanding witnesses' or the court's desires for more complete and definitive information.

C. The "Purpose" Prong of the Undue Burden Test

Under *Casey*, a law may impose an undue burden on women's right to choose if it was enacted for the purpose of placing a substantial obstacle in the path of a woman seeking an abortion. 112 S. Ct. at 2820. *Casey* upholds as constitutional at least the general purposes of similar mandatory disclosure and waiting period laws—ensuring that a woman's decision is based on sufficient information and has been made after time for reflection. Plaintiffs argue that even if Indiana has a legitimate purpose in imposing the mandatory disclosure and waiting period, it has no legitimate purpose in requiring that the required information concerning medical risks and fetal development be provided in person rather than over the telephone. Defendants suggest the Indiana legislature reasonably could have concluded that "sound medical practice required the assessment of risk and fetal age to be done in person, and that the woman contemplating abortion should have some time to reflect on that information in privacy. . . ." Def. Br. at 20.

Casey holds that a state's purpose of reducing the rate of abortions by trying to ensure that women's decisions are well-informed and made after adequate time for reflection is a legitimate and constitutional purpose. It also holds that a state's desire to reduce the rate of abortions by making them more difficult to obtain is not. But *Casey* does not explain how lower courts should go about determining the purpose of a challenged statute regulating abortions, and there are few areas of constitutional law as troublesome as determining the "purpose" of a statute. See, *e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469-70 (1981) (plurality opinion) ("This Court has long recognized that inquiries into congressional motives or purposes are a hazardous matter, and the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive.") (citations omitted). Sometimes the test seems to turn at least in part on the actual subjective motives and intentions of lawmakers. See, *e.g*, *Edwards v. Aguillard*, 482 U.S. 578, 585-94 (1987) (law requiring teaching of "creation science" found to have unconstitutional purpose of promoting certain religious beliefs); *Wallace v. Jaffree*, 472 U.S. 38, 74-77 (1985) (O'Connor, J., concurring in judgment) (inquiry into legislative purpose should be deferential and limited, but courts should not accept an announced purpose that is a "sham"). More often, the Supreme Court generally avoids inquiries into subjective legislative motives and focuses the analysis of legislation on its actual or likely effects and other objective evidence. See, *e.g.*, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-68 (1977) (discussing objective evidence relevant to racially discriminatory purpose, but allowing consideration of legislative history); *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 1682-83 (1968) (focus is on inevitable effects of legislation; Court declined to strike down legislation that would be upheld if a legislator had made a "wiser" speech about it); *Fletcher v. Peck*, 10 U.S. (6

Cranch) 87, 131 (1810) (court will not strike down statute "in consequence of the impure motives which influenced certain members of the legislature which passed the law").

Although the joint opinion in *Casey* does not elaborate on the "purpose" prong of the undue burden test, the opinions of other justices advocating other standards show what the joint opinion's test is not. Justice Blackmun advocated "strict" constitutional scrutiny, upholding restrictions only if the government can demonstrate that the restriction is both necessary and narrowly tailored to serve a compelling governmental interest. 112 S. Ct. at 2847. Under this test, the government would need to show that the "in the presence" requirement itself is actually likely to serve a compelling governmental interest. On this record, the "in the presence" requirement fails that test. The Chief Justice argued in *Casey* that abortion regulations should be upheld so long as the regulation is "rationally related to a legitimate state interest." 112 S. Ct. at 2867. The state's lawyers have articulated an interest that appears to be legitimate, and the "in the presence" requirement appears to meet the minimal hurdle of being rationally related to that objective. However, the joint opinion's "purpose" test seems to lie somewhere between these two positions. It is not clear to what extent its application would depend on evidence of the legislature's subjective motives and goals, evidence of the more objective effects of the challenged restriction, articulation of a legitimate purpose by counsel in litigation, or a combination of these factors.

This court will briefly review the evidence that might be relevant to the purpose issue. As introduced and passed by the Indiana Senate, the legislation required that the mandatory disclosure be made "orally" to the pregnant woman. The "in the presence of the pregnant woman" language was added by a floor amendment in the Indiana House. Debate on the amendment was brief. The sponsor of

the amendment explained the result of the words he proposed but not his underlying reasoning for requiring the information session to be conducted in person:

> [A]ll my amendment does is on page 2, line 22, after the word "abortion" it inserts "and in the presence of the pregnant woman" so it's very clear that the information will be given to the pregnant woman in person and not by telephone. That information can be given to her by her family doctor or by the clinic. It just simply requires that it be given in person and I would appreciate your support. I might add, Mr. Speaker, there's some confusion about the language that presently is in the bill whether the information can be given over the telephone or not and this would clear that up and make it very clear that it should be, it will be given in the presence of the woman and not by telephone or some other conveyance.

Pl. Ex. 38 at 3. Then a member spoke in opposition to amendment and raised some of the same objections that plaintiffs have raised here:

> Some people have referred to the bill itself as the women—women are stupid bill. This amendment is the women are really stupid amendment and I don't mean that as offensively to Representative Alderman. I really feel that very sincerely. Because now we're saying that not only do we have to have this informed consent as if a woman hasn't thought this through, we're saying that if she calls in and talks to the physician and hears all the options and is given the option of seeing the pictures that people want her to see or the information that she has to receive, that she's not capable of understanding that over the telephone. *This is clearly an effort to make the woman have to go into the clinic, to have to go through all the protesters, and to alert those protesters that she'll be back in 18 hours, we'll know exactly who she is, we'll know exactly why she's back, it gives them the second*

> *chance.* I mean if we can have informed consent, we can have the bill as it is now with the language in it that requires the informed consent, that requires her to have to call in and get that, all the information and all the graphic descriptions that you want to give, if that's what you so choose, but *we don't have to have her go into the facility twice in order to receive that information.* I would ask that you reject this amendment.

Id. at 3-4 (emphasis added). Another member spoke in opposition:

> I've had a test, biopsy if you will, for cancer and if you can get that information on the phone when something is life threatening as cancer, I should think if you choose to, you could get any other information on the phone as far as abortion or not to have an abortion or whatever is concerned.

Id. at 4.

After the assertion that supporters of the amendment had an "obstacle" purpose in mind, the chief sponsor of the bill in the House defended the "in the presence" requirement:

> Thank you, Mr. Speaker, members of the House. Real quickly, the purpose of this amendment is quite simply, somebody that's going to make a decision that is this important, *you want to make sure that you're talking to the physician, the advanced practical nurse, the midwife or whomever is spelled out in this bill that that's the person you're talking to.* I mean, the first time you may see this doctor, maybe on the operating table while you're already anesthetic and how do you know this is the doctor or the person you're supposed to be talking to. I mean, that is terrible consequence to rely on somebody you've never met before in your life and to take them at face value that this is the person who may be performing the operation or has the authority from the physician to

> talk to me over a telephone. That is very dangerous, especially when you're talking about the symptoms and consequences of an abortion. *I would think you would want to talk personally to the person who may be performing that and know that they have—know that they are the person indeed that they are.*

Id. at 4 (emphasis added). The House then adopted the amendment, and the Senate eventually concurred with all House amendments.

There is no evidence before the court suggesting that telephone impersonation of health care professionals is a material risk here. Yet when supporters of the "in the presence" requirement were challenged to come up with a legitimate purpose, that was the response. The constitutionality of a law should not necessarily depend, of course, on how nimble its proponents are in a legislative debate, especially in a body trying to deal quickly with a large number of bills. See *United States v. O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it...."). Therefore courts are ordinarily willing to consider other purposes not stated in the floor debate. In this lawsuit, the defendants have suggested only one other purpose for the requirement, the possible benefit of providing some of the medical risk and fetal development information on the basis of an actual physical examination rather than information provided by the woman by telephone. There is no evidence that the legislature actually considered that purpose for the provision. There is also no evidence now before the court showing that this suggested purpose is reasonably likely to provide any genuine benefit.

If the purpose test under *Casey* requires the government to come forward with evidence that a restriction on abortions is reasonably likely to serve a useful and legitimate purpose, the "in the presence" requirement appears to fail that test on

the record now before this court. *Cf. Casey*, 505 U.S. at 920 & n. 6, 112 S. Ct. at 2843 & n. 6 (opinion of Stevens, J.). If the purpose test focuses on evidence of the subjective motivations or intentions of the legislature and allows the court to infer an improper purpose from the absence of an expression of legitimate purpose in the legislature, the "in the presence" requirement also appears to fail that test. The only attempt to offer a legitimate purpose in the legislature—concerns about telephone impersonation of health care providers—deserves no credence. *Cf. Edwards v. Aguillard*, 482 U.S. at 587, 107 S. Ct. at 2579 (Court normally defers to a state's articulated purpose, but only if purpose is "sincere and not a sham"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n. 16 (1975) (Court need not accept assertions of legislative purpose at face value when examination of legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation).[22]

This court has wrestled with the opinions in *Casey* and has tried to identify between the rational relation test and the strict scrutiny test some middle ground that both (a) remains distinct from the "effects" prong of the undue burden test and (b) avoids at least complete reliance on evidence of subjective motivation. *Cf.* 505 U.S. at 920 & n. 6, 112 S. Ct. at 2843 & n. 6 (Stevens, J., dissenting in part) (undue burden

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[22] The evidence here shows that the challenged legislation was supported by a number of groups opposed to abortion in all or nearly all circumstances. Plaintiffs ask the court to treat these groups' support as evidence of the law's unconstitutional purpose. The court declines to do so. The fact that supporters of a law may desire to change the law in ways that would be held unconstitutional does not poison any legislation on the general subject that they may endorse. Plaintiffs have pointed to no case taking such a step, and the Supreme Court has treated a desire or goal of reducing or even outlawing abortion as within the bounds of legitimate political debate. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274, 113 S. Ct. 753, 762 (1993)

standard should analyze both the severity of the regulatory burden and the legitimacy of its justification, and should require evidence that the restriction "serves a useful and legitimate purpose"). The applicable legal standard is not yet clear. At this time, however, this court need not decide plaintiffs' likelihood of success on the "purpose" issue to decide their motion for a preliminary injunction. To obtain a preliminary injunction, plaintiffs must prove an imminent threat of irreparable harm. At least with regard to the "in the presence" requirement in this case, the plaintiffs could not prove a threat of irreparable harm without proving that the requirement is likely to impose an undue burden in its practical effects. They have done so. That proof is both necessary and sufficient to meet the first two essential elements for a preliminary injunction. Proof of an improper purpose would add nothing to the equation. The court therefore declines to characterize at this point the plaintiffs' likelihood of succeeding on the purpose prong of the undue burden standard.

D. Medical Emergency Exception

Since *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), it has been clear that states may not regulate abortions in ways that actually cause harm to women's health. In *Roe*, the Court held that, after viability, a state may regulate or prohibit abortion, except where the abortion is necessary to preserve the life or health of the mother. 410 U.S. at 163-65, 93 S. Ct. at 732. In *Doe v. Bolton*, the Supreme Court upheld the relevant statutory exception for a woman's health on the ground that the statute allowed a physician to exercise a medical judgment "in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. at 192, 93 S. Ct. at 747. In *Casey* the Supreme Court reaffirmed this basic limitation on any regulation of abortion:

"[T]he essential holding of *Roe* forbids a State from interfering with a women's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." 112 S. Ct. at 2822. *Casey* makes clear that any disclosure and waiting period law must contain an exception to ensure that the law will not be applied so as to harm the health of the woman. *Id.*

Public Law 187 excepts from its mandatory disclosure and waiting period requirements a woman who is faced with a "medical emergency." Ind. Code § 16-34-2-1.1. "Medical emergency" is defined in Public Law 187 as

> a condition that, on the basis of the attending physician's good faith clinical judgment, complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

Ind. Code § 16-18-2-223.5.

The Pennsylvania statute upheld in *Casey* contained almost identical language. The construction of that language by the Third Circuit, as a matter of state law, was critical to the Supreme Court's decision. In *Casey*, the district court had held the language of the medical emergency exception unconstitutional because it found that the plain language of the narrow definition "may require a physician to act in ways that do not protect or restore the health of his or her patient in instances where a delay in the abortion procedure will pose a risk to the patient's health, but an immediate abortion may not be necessary to avert her death or to prevent a serious risk of the substantial and irreversible loss of a major bodily function." 744 F. Supp. at 1345. On appeal, the Third Circuit read the statutory language more broadly and held it was facially constitutional. 947 F.2d at 699- 702. That court

reasoned that the Pennsylvania legislature would favor an interpretation of the problematic language "serious risk of substantial and irreversible impairment of a major bodily function" so that compliance with the regulation "would not in any way pose a significant threat to the life or health of a woman." *Id.* at 701. The Supreme Court said that if the statute were read so narrowly as to "foreclose[ ] the possibility of an immediate abortion despite some significant health risks," the Court "would be required to invalidate the restrictive operation of the provision." 505 U.S. at 880, 112 S. Ct. at 2822. However, in construing state statutes, the Supreme Court generally defers to lower federal courts unless an interpretation amounts to plain error. It found no plain error in the Third Circuit's interpretation of the medical emergency exception as a matter of Pennsylvania law. *Id.*

Plaintiffs contend the medical emergency exception in Public Law 187, interpreted as a matter of Indiana law, does not pass constitutional muster. The question at this preliminary stage of the case is whether the plaintiffs have shown a reasonable likelihood of success on their claim that Indiana's medical emergency exception does not meet the constitutional standard. The court will review first the relevant evidence and then Indiana law on statutory construction.

Much of the evidence concerning the health risks faced by pregnant women comes from the hearing testimony and affidavit of Dr. Jane Hodgson, a physician specializing in obstetrics and gynecology.[23] Dr. Hodgson's testimony establishes that women face many increased health risks from pregnancy, including complication of a wide range of pre-

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[23] Dr. Hodgson was trained and educated at the University of Minnesota Medical School and the Mayo Clinic, among other places. She has been a licensed physician for over 55 years and has been board certified in obstetrics and gynecology since 1949. She has published many papers and articles in the area of obstetrics and gynecology.

existing conditions such as asthma, epilepsy, diabetes, cardiac problems, chronic renal failure, myasthenia gravis, obesity, pulmonary emboli, and cancer. The pregnancy itself may pose some health risks, including hypertension and diabetes. Where a pregnancy complicates a pre-existing chronic condition such as asthma, epilepsy, or diabetes, Dr. Hodgson's testimony shows that the complications can create medical conditions that range all across a spectrum of severity, from immediate threats to life to very mild and temporary conditions. Dr. Hodgson's testimony shows that pregnant patients can experience a number of serious health problems such that delaying an abortion may cause severe but temporary pain, or may pose a threat of temporary but not irreversible damage.

In addition to the evidence from Dr. Hodgson about serious physical problems, Dr. Connie Best testified in her affidavit about the psychological risks for women who are pregnant and who are victims of rape, incest, or domestic violence. Her testimony indicates that such women may suffer severe psychological harm if they are required to delay an abortion or if they are required to hear some of the information required by Public Law 187.

The statute must be evaluated in light of this evidence about the kinds of medical situations in which questions about its application may arise. The language chosen by the legislature includes several limitations. The reference to "substantial and *irreversible* impairment" seems to exclude even the mostsevere and painful physical effects, so long as they are temporary. That limitation would appear to apply regardless of the extent of time, pain, and treatment that would need to be endured in healing. The reference to "major *bodily* function" appears to exclude consideration of a woman's mental and emotional health. The term "*major* bodily function" creates by clear implication a category of "minor bodily functions" such that even substantial and

irreversible impairment of them could not warrant an exception from the law. Looking solely at the language of the statute, it is difficult to see how these restrictive concepts can be reconciled with the requirement in *Casey*, *Roe*, and *Doe* that a medical emergency exception apply where compliance would cause "a threat to her health." *E.g.*, 505 U.S. at 880, 112 S. Ct. at 2822.

Of course, courts do not construe statutes in a vacuum or as an academic exercise. The defendants rely on two important principles of statutory construction to save the Indiana law. First, Indiana courts construe statutes, if reasonably possible, so as to render them constitutional. Second, where the legislature copies language from another jurisdiction where it has been construed by the courts, the legislature should be presumed to have intended that the language be given the same construction. Defendants also contend that because they are the public officials charged with enforcement of the law, the federal courts owe some deference to their construction of the law. Weighing against these considerations are the force of the statutory language actually enacted, evidence of the legislature's actual (as opposed to its presumed) intention, and the context in which the statutory language must be applied.

After balancing these considerations, the court believes the plaintiffs have a reasonable likelihood of prevailing on the merits of their claim that the Indiana medical emergency exception is unconstitutionally narrow. The court will issue a preliminary injunction on that basis. However, as defendants point out, any decision the federal courts may make on this issue of Indiana law is provisional and subject to correction by the Indiana courts. Defendants have asked this court to certify to the Supreme Court of Indiana the interpretation of the medical emergency definition. The court will do so in order to obtain a definitive resolution of this aspect of Indiana law. Because certification does not

provide an immediate answer, however, this court must resolve the question as best it can for purposes of ruling on plaintiffs' motion for preliminary injunction. If the Supreme Court of Indiana disagrees, this court will promptly review its own decision and take appropriate action.

1. Plain Language

The dominant principle of statutory construction in Indiana law is that the plain language of the statute is the expression of the legislature's intent that must be given effect. *E.g., Indiana Dep't of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870, 872 (Ind.1994) ("Nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the statute itself"; "unambiguous statute must be held to mean what it plainly expresses, and its plain and obvious meaning may not be enlarged or restricted"); *Benham v. State*, 637 N.E.2d 133, 136 (Ind.1994) (clear and unambiguous statutory language leaves no room for judicial construction; words and phrases must be taken in their plain, ordinary, and usual senses); *Department of Public Welfare v. Couch*, 605 N.E.2d 165, 167 (Ind.1992) ("words are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself"). It is the statutory language that is presented to the governor for signature or veto. It is the statutory language that is most readily available to those who are trying to conform their conduct to law.

Would the Indiana courts construe the language of the medical emergency exception in a way that is constitutional? Defendants argue that this language includes concepts that require some degree of construction, such as "serious" risk, "substantial" impairment, and "major" bodily function. The terms "serious," "substantial," and "major" all require some degree of quantitative judgment in application to specific cases. Those terms allow some latitude for the exercise of such judgments, and in that room left for those judgments,

the concerns of physicians and patients may be reconciled with concerns of proponents of the legislation who fear a broad exception may invite abuse.[24]

The constitutional problem lies not in these flexible terms of degree but in the definition's other terms. The difference between "irreversible" and severe-but-temporary is not easily washed away as a matter of degree. Similarly, the gap between a "major bodily function" and mental or psychological health also cannot be bridged so easily by construction.

The issue here is whether, as a matter of Indiana law, the provision containing all those terms can be construed as the equivalent of a statute that excuses compliance with an abortion regulation whenever compliance would constitute "a threat" or "a significant threat" to the woman's "health." See *Casey*, 505 U.S. at 880, 112 S. Ct. at 2822 (using both terms). The court may construe statutory language so as to render it constitutional only to an extent that the construction is reasonable. *In re Public Law No. 154-1990*, 561 N.E.2d 791, 792 (Ind.1990) (court's duty is to bring statute in harmony with constitutional requirements "if the language permits"); *Grody v. State*, 257 Ind. 651, 278 N.E.2d 280, 285 (1972) (court "will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute Congress did enact will permissibly bear a construction rendering it free from constitutional defects") (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515, 84 S. Ct. 1659, 1669, 12 L. Ed. 2d 992 (1964)). As examples of this reluctance expressed in *Grody*, see, e.g., *Brady v. State*, 575 N.E.2d 981, 988-89

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[24] In construing the Pennsylvania statute as constitutional in *Casey*, the Third Circuit focused on three specific conditions and relied on the flexibility in these same statutory terms of degree to hold that the medical emergency exception would apply to those conditions. See 947 F.2d at 700-02.

(Ind.1991) (plain language of statute violated defendant's right under state constitution to "meet the witnesses face to face"); *In re Public Law No. 154-1990*, 561 N.E.2d at 792-93 (statutory declaration of absolute immunity from attorney disciplinary rules clearly violated separation of powers). As the Supreme Court of Indiana explained:

> A court cannot amend a statute or establish public policy within its judicial authority to confine legislative products to constitutional limits. However, a court in reading a statute for constitutional testing, may give it a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent. State v. Kuebel (1961), 241 Ind. 268, 172 N.E.2d 45.

State v. Downey, 476 N.E.2d 121, 123 (Ind.1985). In *Downey* the court found that the particular language at issue ("may endanger" in a child neglect statute) did not "indicate a critical legislative choice or represent the resolution of important issues within the social problem involved." *Id.* The court therefore found that a saving interpretation was permissible. See also *Burris v. State*, 642 N.E.2d 961, 968 (Ind.1994) (giving saving construction to death penalty statute); *Price v. State*, 622 N.E.2d 954, 963-64 (Ind.1993) (giving saving construction to statutory reference to "public nuisance").

Although some of the statutory terms can be stretched to some extent, defendants have not explained how language of "irreversible" impairments can be extended to temporary but severe conditions. Nor have they explained how language referring to a "major bodily function" can be extended to psychological and mental health. At least they have not offered such explanations based on the language itself. Thus, the assertion that the courts should construe this language as constitutional appears to take the approach rejected in *Grody v. State*: consider whether the legislature *might* have enacted

a valid statute on the subject, and then impose on the enacted language whatever construction is needed to save the statute. 278 N.E.2d at 285. That approach effectively requires courts to write statutes rather than to construe them, and Indiana courts ordinarily refuse invitations to do so. *Cf. Jane L. v. Bangerter*, 61 F.3d 1493, 1501-02 (10th Cir. 1995) (reversing district court's saving construction of ban on fetal "experimentation" as a judicial "rewriting" of statute).

In fact, in a very similar context, the Supreme Court of Indiana adhered to a remarkably restrictive construction of a statutory exception for medically necessary abortions. In *Cheaney v. State*, 259 Ind. 138, 285 N.E.2d 265 (1972), decided a few months before *Roe*, the court considered whether the medical exception to the Indiana law proscribing abortions was unconstitutionally vague. The criminal law then prohibited the performance of all abortions unless "necessary to preserve [the pregnant woman's] life." *Id.* at 266. The court held that that language was not vague but plainly meant, in light of "the context of the entire statute," that "an abortion will be allowed only when the continuation of the pregnancy will directly and proximately result in the death of the mother." *Id.* at 271. Justice DeBruler dissented from the judgment on constitutional privacy grounds. He did not suggest the majority had misread the statute, but pointed out that the statute, as worded, prohibited all abortions except in cases "where death will *certainly* result to the pregnant woman," thus requiring a pregnant woman to forego an abortion and "run the risk of dying when that risk is not a certainty, but only a *middle range possibility*." 285 N.E.2d at 274 (emphasis added). The majority responded: "If this law appears too strict or harsh for some, the place to change it is not in the courts but in the legislature." *Id.* at 271. Subsequent developments in constitutional standards would cause the Supreme Court of Indiana to decide some of the federal constitutional issues differently, but the court's faithfulness to the strong language of the statute is evident.

2. Legislative Intent

It is unclear whether the Supreme Court of Indiana would be willing to consider evidence beyond the language of the statute in construing it, at least as to the terms "irreversible" and "major bodily function." See, *e.g.*, *Orr v. Turco Mfg. Co.*, 484 N.E.2d 1300, 1302 (Ind.App.1985) (when statute is unambiguous, legislative history should not be used to determine its meaning). *Cf. O'Laughlin v. Barton*, 582 N.E.2d 817, 821 (Ind.1991) (when legislation is susceptible to several different constructions, court may look at legislative journals to determine legislative intent); *County Dep't of Public Welfare v. Potthoff*, 220 Ind. 574, 585, 44 N.E.2d 494, 498 (1942) (same). Assuming that the court would be willing to consider such materials, defendants base their strongest argument on the near identity between the Indiana language and the Pennsylvania language that was construed and then upheld in *Casey*. Defendants contend that the Indiana legislature intended to adopt the construction that had been placed on the Pennsylvania statute. Indiana courts may presume that when the Indiana legislature adopts statutory language from a sister state, the constructions placed on such language are adopted as well. *In re Marriage of Hudson*, 434 N.E.2d 107, 113 (Ind.App.1982); *In re City Investing Co.*, 411 N.E.2d 420, 427 (Ind.App.1980). See also *Miller v. Mayberry*, 506 N.E.2d 7, 11 (Ind.1987) (legislature presumed to be aware of prevailing judicial construction of a statute in Indiana); *Lewis v. Lockard*, 498 N.E.2d 1024, 1026 (Ind.App.1986) (same).[25]

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[25] Defendants also point out that other federal courts have adopted similar constructions of other state laws copying the Pennsylvania law. See *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d at 1467; *Fargo Women's Health Org. v. Schafer*, 18 F.3d at 533; *Barnes v. Moore*, 970 F.2d at 15; *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. at 1492-94. However, the courts' opinions in those cases do not address the specific issues raised here. They do not explain whether or how

It is not entirely clear how the Supreme Court of Indiana might resolve the tension between the plain language of a statute and the foregoing presumption if there were no other pertinent evidence on the question. As the Supreme Court of the United States has explained, however, the presumption that judicial constructions are borrowed from other jurisdictions along with their statutory language is "a presumption of legislative intention ... which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention." *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944). Here the material language is identical and the single decision construing the Pennsylvania language was certainly known to the Indiana legislature. However, the force of defendants' argument is limited not only by the weight of the language actually enacted by the legislature ("substantial and irreversible impairment of a major bodily function") but also by the "other indicia of intention"—in this case, evidence of the Indiana legislature's actual intention when it squarely confronted this issue.

As introduced and as originally passed by the Indiana Senate, the medical emergency exception tracked the language from the Pennsylvania statute quoted above, "serious risk of substantial and irreversible impairment of a major bodily function." The statute upheld in *Casey* was plainly the model for this language. However, the Indiana House committee considering the bill amended the definition. It substituted the phrase "serious risk of substantial permanent impairment to the woman's life or health." This

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"irreversible" may apply to temporary but severe impairments, nor whether or how "major bodily function" may apply to mental health. They also did not have before them evidence of legislative history undermining the reliance on the interpretation of *Casey*, as discussed below.

language was taken from Ind. Code § 16-34-2-1(3), which is the "life or health" exception for post-viability abortions. The bill then came to the House floor for amendments on second reading. The bill's chief sponsor in the House appealed to his colleagues to remove the reference to "health" and to restore the Senate version of the medical emergency definition:

> This deals with medical emergencies and the purpose of the bill that if there's a medical emergency where the woman's life is in danger, that it doesn't seem prudent unless the doctor has some time to inform the woman, go through the consent, have her see everything that's necessary and all that, that we realize that there is an emergency. It's something different than someone contemplating an abortion, and this may be something that she doesn't even want. This is a medical emergency. However, it was changed in the committee to put permanent impairment, if you look on page two, line five, and also page three, line 27 of the life or physical health of the pregnant woman. *The reasons we need to change this back quite frankly is this opens it up to every abortion you can think of whether it's an emergency or not.* Complete opposite of the supporters of this bill is what they do not want here. Quite frankly, an opinion we have from the language instead of talking about preventing her death, this language will talk about her physical health instead of her imminent death because of not having an abortion.
>
> *Also, by having the word "health" at the end of those two sentences instead of the words that I propose, impairment of major bodily function, those words could mean anything that affects a woman's well being from including physical, sociological or family problems.* So, if she has a disagreement with her husband it now becomes an emergency and they can perform an abortion

> without an informed consent or the items go along with it, that's the danger of those words. If you believe in this bill, we need to take those words out and go back to the purpose of this bill, especially for a medical emergency, if the woman's life is in danger which we all can agree with. I would ask your support of this amendment.

Pl. Ex. 38 at 1-2 (emphasis added). He later explained:

> This is talking about someone's life and again, just to point out that the federal government under *Doe v. Dalton* [sic] has defined "health" which is in this bill to mean *anything which affects a woman's well being including psychological, sociological or family problems and that's certainly what we do not want, even though her intentions may be good, this completely reverses that bill.* I ask again for your support for my amendment.

Pl. Ex. 38 at 2 (emphasis added). The House then voted to amend the definition to restore the original language.

The House committee's adoption of a broader definition, the House floor debate, and the restoration of the narrower language show that the Indiana legislature did *not* intend for the statutory language to be construed as broadly as the Third Circuit interpreted the language in *Casey* or as broadly as the Constitution requires. The legislature copied the statutory language approved in *Casey*, but when the specific issue came to a head, supporters of the bill were asked to restore the narrower language precisely because it would *not* permit the broader "construction" proposed by defendants here and would have a meaning different from the meaning of "health" in *Doe v. Bolton*.[26] They did so. Thus, it appears

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[26] The transcript refers to "*Doe v. Dalton*," but the sponsor surely meant *Doe v. Bolton*. The court is unaware of a case called *Doe v. Dalton*, and *Doe v. Bolton* discusses the precise concerns the sponsor raised, an expansive definition of the word "health" in the abortion context. See 410 U.S. at 192, 93 S. Ct. at 747. See also Pl. Ex. 31 at 100305 (letter of

that the legislature made "a critical legislative choice" on this issue that prevents a different interpretation for the purpose of saving the legislation. See *State v. Downey*, 476 N.E.2d at 123 (court may give narrowing construction where it is "consistent with legislative intent" and where language "does not indicate a critical legislative choice or represent the resolution of important issues within the social problem involved").

In holding that states may "regulate, and even proscribe, abortion" during the third trimester, *Roe* mandated an exception to such regulations "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 165, 93 S. Ct. at 732. *Roe* and *Doe v. Bolton*, decided the same day, "are to be read together." 410 U.S. at 165, 93 S. Ct. at 733. Therefore, when *Roe* forbids state regulation when "preservation of the life or health of the mother" is necessary, the Court was referring to the broader concept of "health" found in *Doe v. Bolton*. *Casey* did nothing to alter the threshold of the required medical exception set forth in *Roe*. See 505 U.S. 878-80, 112 S. Ct. at 2821-22. By rejecting the broader concept of health when the specific issue was raised, the Indiana legislature provided substantial evidence about how it intended the language to be applied. Its intent seems to have been that the words of the statute mean what they say. In the face of both the statutory language and the evidence of the actual legislative intent, it appears the Indiana statute cannot be saved by the preference for an interpretation to save the statute or the presumption that the legislature intended to adopt another jurisdiction's judicial construction.

3. The Role of "Fair Notice" in Statutory Construction

April 9, 1995, received by bill's sponsor (and apparently the "opinion" referred to in House debate) urging use of original language because *Doe v. Bolton* concept of "health" was too broad).

In its entry explaining the issuance of the temporary restraining order in this case, the court based its initial view of the Indiana definition of medical emergency in part on the need for physicians to have fair notice of what the law requires and prohibits. These concerns take on special force when a law applies in the context of medical emergencies, where prompt action may be required. A violation of the law can result in severe legal and professional consequences for the physician, while a misunderstanding of the law in the other direction could have avoidable adverse health consequences for the patient.

Defendants point out that the Third Circuit in *Casey* rejected a "void for vagueness" challenge to the definition, 947 F.2d at 702, and that the Eighth Circuit in *Fargo Women's Health Organization* rejected a vagueness challenge to the virtually identical language in North Dakota's statute, 18 F.3d at 534-35. This court is not suggesting that defendants' proposed construction of the Indiana law would render the law unconstitutionally vague. However, the Indiana courts could consider issues of fair notice and context in determining whether the proposed construction is correct as a matter of statutory interpretation.

A proposed construction of a statute can survive constitutional "void-for-vagueness" scrutiny, yet still be so at odds with the apparent meaning of the language that the Indiana courts would reject the proposed construction. This may be such a case. As Dr. Hodgson's testimony indicates, the language of the statute is not entirely clear to her as a physician, but it appears to exclude from the definition of a medical emergency some situations that doctors would consider to be emergencies warranting immediate abortions. The Indiana courts might consider relevant the fact that physicians would need to apply the law in the context of medical emergencies, understood broadly. This is not a situation where the parties trying to conform their conduct to

law will always have an opportunity to ask for a legal opinion from counsel before they take action. The Indiana courts could consider, in interpreting the law, the need for physicians making decisions about the life and health of their patients to be apprised of what treatment they may legally prescribe. In that context, even a decision by the Supreme Court of the United States construing similar language in another state's statute in a way not obviously consistent with its language might not be readily accessible to physicians trying to conform their conduct to law in an emergency situation.

Assuming that a physician had an opportunity to seek a legal opinion on a particular situation, even the fact that *Casey* is on the books does not necessarily solve the problem as a matter of Indiana statutory construction. In addition to the statutory language and legislative history discussed above, the Indiana courts might also consider relevant the fact that the same chapter of the Indiana Code already has two other medical emergency provisions. See Ind. Code § 16-34-2-1(3)(C) (permitting post-viability abortions where abortion is "necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman"); Ind. Code § 16-34-2-4(i) (parental consent for minor's abortion not required where "continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman"). The Seventh Circuit has upheld the constitutionality of the second exception, construing it as allowing a physician to use his or her medical judgment, "a judgment that would be questioned only if the physician did not believe there was a *health danger*." *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1139 (7th Cir.1983) (emphasis added). Courts ordinarily would consider significant the legislature's use of three different formulas in such close proximity dealing with the same type of question. See, *e.g.*, *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 541

(1994); *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 277, 95 S. Ct. 2150, 2154-55 (1975). A physician who had an opportunity to ask a lawyer to research these matters might reasonably hesitate in view of these different formulas for medical emergencies in the abortion context. And the Indiana courts might reasonably consider the plight of the physician—facing severe legal and professional sanction if she errs in one direction and avoidable harm to her patient if she errs in the other—in deciding how to construe the language of the statute.

4. Application to Victims of Rape and Incest

Much of the debate in the Indiana House of Representatives concerned whether the bill would exempt victims of rape and incest from the mandatory disclosure and waiting period requirements. This debate focused on a small fraction of the women seeking abortions, where a subject already emotionally charged becomes even more so. The evidence at the hearing showed that about one percent of the abortions performed are for women who are victims of rape or incest. The legislature ultimately decided to excuse rape victims from being told that the father could be liable for child support. It rejected all other efforts to create such exceptions.

The defendants contend correctly that *Casey*, *Roe*, and the Constitution do not require an exception from the disclosure and waiting period for victims of rape and incest, as such. See *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d at 1467, 860 F. Supp. at 1421. Nor is it appropriate for federal judges to evaluate such statutes based on their own views of such legislative policy decisions. However, the Supreme Court noted in *Casey* that a physician was not required to comply with Pennsylvania's informed consent and waiting period requirements "if he or she can reasonably demonstrate by a preponderance of the evidence that he or she reasonably believed that furnishing the

information would have resulted in a severely adverse effect on the physical or *mental health* of the patient." 505 U.S. at 883-84, 112 S. Ct. at 2824 (quoting statute) (emphasis added). The Indiana statute contains no similar language. *Casey* did not state explicitly that such an exception for mental health is constitutionally required. However, the holdings of *Casey* and *Roe* that a state may not impose abortion regulations that would pose a significant threat to a woman's health, and the broad view of "health" adopted in *Doe v. Bolton*, together indicate that there must be such an exception to the mandatory disclosure and waiting period provisions. Accord, *United States v. Vuitch*, 402 U.S. 62, 71-72, 91 S. Ct. 1294, 1299, 28 L. Ed. 2d 601 (1971) (medical necessity exception not unconstitutionally vague; "health" included psychological as well as physical well-being). See also *Casey*, 505 U.S. at 882, 112 S. Ct. at 2823 ("It cannot be questioned that psychological well-being is a facet of health.").

The affidavit of Dr. Connie L. Best concerning women who are victims of rape and incest shows that a significant proportion of victims suffer significant psychological difficulties, including post-traumatic stress syndrome or a major depressive episode. Such difficulties can be made worse by pregnancy resulting from the rape or incest. Dr. Best also testified in her affidavit concerning the effects the law may have on battered women. She stated that some of the state-mandated information could be "extremely psychologically harmful" to victims of rape, incest, and other forms of violence. Her testimony stands unrebutted on this record. There may be many cases where a physician will conclude that an individual victim of rape, incest, or other violence would not risk serious harm to her health by complying with the statute. Dr. Best does not deny that possibility. But the narrow definition of "medical emergency" in the Indiana law would require compliance with the law despite a reasonable medical judgment that

compliance appears to cause serious harm to the mental health of a particular victim.

The issue is not whether the Constitution requires an exception for women who are the victims of rape, incest or domestic violence, but whether it compels an exception for the mental health of the pregnant woman, whatever event or condition may trigger the concern.[27] The evidence shows that some women, because of rape, incest, violence, fetal anomalies, or other reasons, will experience severe emotional or psychological harm if they must wait to have an abortion or be provided all the prescribed information. The absence of a medical exception that includes aspects of mental and emotional health appears likely to violate the Constitution.

5. Deference to Construction by State Officials

Defendants assert that this court is required to give considerable deference to their own interpretation of the law because they are charged with enforcing it. See *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96, 109 S. Ct. 2746, 2755-57, 105 L. Ed. 2d 661 (1989); *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S. Ct. 2495, 2501-02 (1988); *Kolender v. Lawson*, 461 U.S. 352, 355, 103 S. Ct. 1855, 1857, 75 L. Ed. 2d 903 (1983). Their proposed construction is that adopted

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[27] Similar considerations may apply in the cases of women carrying so-called anomalous fetuses. Dr. Hodgson testified that about 50 percent of women who find out that they are carrying an anomalous fetus elect to terminate the pregnancy and that many such women are quite anxious to obtain an immediate abortion. Most such pregnancies are planned pregnancies, and women are often distraught to learn that the child would be unable to survive or would be born with very severe physical or developmental disabilities. Thus, compliance with the information and waiting period requirements of the Indiana law could produce extreme anguish. Defendants point out that some women in this situation could also benefit from additional time. However, at least in severe situations, the Constitution appears to require that such matters be left to the physician's judgment.

by the Third Circuit in *Casey*: the exception applies where compliance would "in any way pose a significant threat to the life or health of a woman." 947 F.2d at 701. For the reasons explained above, this court does not believe that the defendants' proposed construction of the statute can be reconciled, as a matter of Indiana law, with the language the legislature chose to enact. The court therefore believes that plaintiffs have shown a reasonable likelihood of succeeding on the merits on this claim. However, as defendants point out correctly in their motion for certification to the Supreme Court of Indiana, any decision this court might make on this question of Indiana law is merely provisional and subject to erasure by the Supreme Court of Indiana. The court will therefore grant the motion for certification so that the Supreme Court of Indiana may resolve these issues.

V. Irreparable Harm, the Balance of Harms, and the Public Interest

The *Casey* joint opinion made clear that the essential holding from *Roe* that a woman has a constitutional right to choose whether to continue or terminate her pregnancy is still the law. Given the nature of the right and the high standard that must be satisfied to show that a law's effects impose an "undue burden" on the right, a plaintiff who proves the likelihood of an undue burden has also shown the threat of irreparable harm. See *Planned Parenthood v. Casey*, 114 S. Ct. at 910 (Souter, J., in chambers) (proof of "substantial obstacle" would establish irreparable harm); *Doe v. Mundy*, 514 F.2d 1179, 1183 (7th Cir.1975) (violation of privacy right to choose abortion would cause irreparable harm); *Doe v. Bellin Memorial Hosp.*, 479 F.2d 756, 759 (7th Cir.1973) (interference with right to have timely abortion would be irreparable). Here, too, there would be irreparable harm if Public Law 187 is not enjoined.

The evidence that tends to show the "in the presence" requirement of Public Law 187 imposes an undue burden on

a woman's right to choose to have an abortion supports the plaintiffs' claim of irreparable harm. The Mississippi data support the inference that the Indiana law is likely to prevent approximately 11 to 14 percent of Indiana women who would otherwise choose to have an abortion from doing so. The information from Mississippi, North Dakota, and the plaintiff clinics in Indiana, together with the absence of evidence showing that mandatory disclosure laws actually change women's minds, all support the inference that the likely drop in the number of women having abortions would be the result of burdensome effects of the Indiana law rather than the persuasive effects of the mandatory disclosures and waiting period. The evidence indicates that more than 15,000 abortions are performed in Indiana each year. See Pl. Ex. 5 (15,840 in 1992). Applying the rate of 11 to 14 percent to an annual total of 15,000, if the Indiana law were to go into effect with its "in the presence" requirement, the result would be that over the next year, approximately 1,650 to 2,100 women in Indiana would be unable to obtain abortions they would otherwise choose to have. That is substantial and irreparable harm.[28]

On the other side of the equitable scale, defendants argue that a preliminary injunction will cause irreparable harm

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[28] Defendants point out that there is no "Jane Roe" as a plaintiff in this case, and that harm to the plaintiff clinics from enforcement of the Indiana law would be only financial. However, because of both the privacy concerns at stake and the very brief time any one individual pregnant woman has a stake in the issue, providers of abortion services have standing to raise the privacy rights of their patients. *E.g., Singleton v. Wulff*, 428 U.S. 106, 117, 96 S. Ct. 2868, 2875 (1976) (plurality opinion). In addition, the court must make its decision on a motion for preliminary injunction in light of consequences for those who are not actually parties to the lawsuit. *E.g., Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir.1994). Also, even financial harm to the clinics would be irreparable in light of the immunity doctrines that would block any damages action.

because there is a "small, but real group of women that clearly benefit from additional information and a reflective period." The defendants' evidence on this point shows that under the deferential rational relation standard of constitutional review, the Indiana legislature could rationally have found that there is such a group of women whose needs for information and time are not met by existing Indiana law requiring informed consent for medical procedures and by current practices among Indiana providers of abortion services. But the evidence offered at the preliminary injunction hearing does not show that such a group of women exists in fact.

The only testimony on this score admissible for the truth of the matters asserted came from Ms. Dowden and Ms. Huddleson. They testified about their own experiences in the mid-1970s. Their accounts of their experiences are troubling, for each believes that she was misled about relevant information and pressured into having an abortion that she now regrets. Because their experiences were so long ago, however, and because the evidence from the plaintiffs indicates that such problems occur now very rarely, if at all, their testimony does not show that current Indiana law and actual practices today are insufficient to ensure that women make informed and thoughtful decisions. See *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1231 (N.D. Ill.1985) (in balancing harms at preliminary injunction stage, court could consider fact that other existing laws would remain in effect to protect the public), *aff'd in part, vacated in part on other grounds*, 841 F.2d 1358 (7th Cir.1988), appeal dismissed, *Turnock v. Ragsdale*, 503 U.S. 916, 112 S. Ct. 1309 (1992). Also, it is far from clear that compliance with the specific provisions of Public Law 187 would have caused either of these witnesses to have changed her mind under the circumstances she faced at the time.

To show irreparable harm from an injunction, defendants also rely on evidence from Jane Stout and Dr. Hodgson concerning the ambivalence that some women and teenagers show about their choice. The evidence from plaintiffs indicated, however, that their counselors are trained and instructed to make sure that patients are aware of and have considered their options, and that if a patient seems ambivalent about her choice, additional time and counseling are provided. Plaintiffs do not require such "options counseling" where there is no indication of a need for it. The record now before this court does not show that plaintiffs' practices are inadequate such that an injunction is likely to prevent any woman from either receiving information she actually needs or taking any time she wants or needs to make her choice.

The task of the district court facing an application for a preliminary injunction is to evaluate the merits of the case on a tentative and provisional basis and to weigh the consequences of granting the injunction against the consequences of denying the injunction. As the Seventh Circuit has explained, this task is not subject to an exact formula, but the court should try to minimize the risk and consequences of an erroneous decision. *E.g., Abbott Labs.*, 971 F.2d at 12. For the reasons explained above, the plaintiffs have shown a reasonable likelihood of showing that the medical emergency exception (which is essential to all the provisions of Public Law 187) and the "in the presence" requirement for the mandatory disclosure and waiting period provisions are likely to impose undue burdens on women's rights to make their own decisions about whether to continue or terminate their pregnancies.[29]

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[29] The defendants have suggested that the "in the presence" requirement might be severed from the remainder of the disclosure and waiting period requirements. The apparent constitutional flaws in the medical emergency exception for the entire law call for an injunction against

If an injunction were denied, the evidence before the court at this point shows that the burdens of the "in the presence" requirement would likely prevent hundreds of women in Indiana each year from having abortions they would otherwise choose to have. Those individual women cannot be identified at this time, but the irreparable harm to them is both predictable and substantial. If an injunction is granted, there is a possibility that some women might choose to have abortions without being sufficiently aware of their alternatives and without taking sufficient time to consider their choice. The evidence now before the court does not establish, however, that this risk is either real or substantial. The court's provisional evaluation of the merits and the evidence relevant to the issue of irreparable harm therefore weigh in favor of enjoining enforcement of Public Law 187 pending final resolution of this case. That final resolution will be reached after both sides have had a sufficient opportunity to develop and present additional evidence, and after the Supreme Court of Indiana has had an opportunity to consider the determinative issues of Indiana law.

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enforcement of Public Law 187 as a whole. If the Supreme Court of Indiana construes the medical emergency exception so as to eliminate those flaws, the issue of severability may need to be addressed at that time.

VI. Conclusion

For the foregoing reasons, the court is issuing today a preliminary injunction enjoining enforcement of Public Law 187 pending a final judgment on the merits or further order of this court

Date: November 9, 1995

/s/

DAVID HAMILTON, JUDGE.
United States District Court
Southern District of Indiana

In the

United States Court of Appeals

For the Seventh Circuit

No. 01-2107

A WOMAN'S CHOICE—EAST SIDE WOMEN'S CLINIC, *et al.*,

Plaintiffs-Appellees,

v.

SCOTT C. NEWMAN, Prosecuting Attorney for Marion County Indiana, on behalf of a class of prosecutors, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 95-C-1148-C-H/G—**David F. Hamilton**, *Judge*.

Order

October 28, 2002

Before COFFEY, EASTERBROOK, and DIANE P. WOOD, *Circuit Judges*.

Plaintiffs-appellees filed a petition for rehearing and rehearing en banc on September 30, 2002. A vote of the active members of the court was requested[1] and the petition for rehearing en banc was denied by an equally divided court.[2] A majority of the judges on the panel[3] have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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[1] Judge Ripple took no part in the consideration or decision of this case.

[2] Judges Posner, Rovner, Diane P. Wood, Evans and Williams voted to grant rehearing en banc.

[3] Judge Diane P. Wood voted to grant rehearing.

INDIANA CODE ,TITLE 16., ARTICLE 34.

CHAPTER 2. REQUIREMENTS FOR PERFORMANCE OF ABORTION; CRIMINAL PENALTIES

IC 16-34-2-1.1

Voluntary and informed consent required

Sec. 1.1. An abortion shall not be performed except with the voluntary and informed consent of the pregnant woman upon whom the abortion is to be performed. Except in the case of a medical emergency consent to an abortion is voluntary and informed only if the following conditions are met:

(1) At least eighteen (18) hours before the abortion and in the

presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice nurse (as defined in IC 25-23-1-1(b)), or a midwife (as defined in IC 34-18-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:

(A) The name of the physician performing the abortion.

(B) The nature of the proposed procedure or treatment.

(C) The risks of and alternatives to the procedure or treatment.

(D) The probable gestational age of the fetus, including an offer to provide:

(i) a picture or drawing of a fetus;

(ii) the dimensions of a fetus; and

(iii) relevant information on the potential survival of an unborn fetus; at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:

(A) That medical assistance benefits may be available for

prenatal care, childbirth, and neonatal care from the county office of family and children.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

(3) The pregnant woman certifies in writing, before the abortion

is performed, that the information required by subdivisions (1)

and (2) has been provided.

(3)

Supreme Court, U.S.
FILED
JAN 17 2003
OFFICE OF THE CLERK

No. 02-935

IN THE

Supreme Court of the United States

A WOMAN'S CHOICE-EAST SIDE WOMEN'S CLINIC, *et al.*,
Petitioners,

v.

CARL J. BRIZZI, in his official capacity as Prosecuting Attorney for Marion County, and GREGORY WILSON, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether Indiana may require women to obtain in-person counseling eighteen hours before having an abortion in light of the fact that *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), already upheld a similar requirement and in light of a record that contains (a) no evidence concerning the impact of the in-person requirement in Indiana and (b) no explanation as to how such a requirement could impose an "undue burden."

PARTIES TO THE PROCEEDINGS

The Petitioners are several abortion clinics and a physician: A Woman's Choice East-Side Women's Clinic, Indianapolis Women's Facility, A Clinic for Women, Inc., Planned Parenthood of Central and Southern Indiana, Inc., Fort Wayne Women's Health Organization, Ulrich G. Klopfer, D.O., Women's Pavilion, Inc. and Friendship Family Planning Clinic of Indiana.

The Respondents are a class of all Indiana prosecuting attorneys, in their official capacities, with the Marion County prosecuting attorney as class representative, and the Commissioner of the Indiana Department of Health, Gregory Wilson, M.D., in his official capacity. The defendant prosecuting attorney class representative formerly was Marion County Prosecutor Scott C. Newman. However, on January 1, 2003, Carl J. Brizzi succeeded Mr. Newman as Marion County Prosecutor. Pursuant to Supreme Court Rule 35.3, Mr. Brizzi is automatically substituted for Mr. Newman.

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STATEMENT

In the decision below, the Seventh Circuit reached the unremarkable conclusion that, in order for Indiana's in-person abortion counseling requirement to constitute an "undue burden" under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), it must be judged by its actual effects in Indiana, not by a similar law's impact in another state. Pet. App. A-16-17. The Seventh Circuit's holding reversed the district court's conclusion that, notwithstanding the fact that *Casey* itself had *upheld* an in-person counseling requirement, Indiana's law could be enjoined based on the impact of similar laws in Mississippi and Utah, even without an explanation as to *how* the law could impose an undue burden. Pet. App. A-14, A-16-17, A-111, A-118.

In the guise of manufacturing some inconsistency between the decision below and *Casey*, the Petition merely raises a garden-variety dispute over the level of deference a court of appeals should give to a district court's conclusions concerning the legal significance of historical facts. Petitioners urge the Court to adopt a rule that renders such district court conclusions nearly impregnable. This issue is both unworthy of the Court's attention and already resolved by the Court's holdings in other areas of the law. Unless *all* lower court decisions that uphold state abortion regulations are sufficiently important to merit Supreme Court review, there is nothing in the Seventh Circuit's decision that justifies granting certiorari.

1. In 1992, in its landmark *Casey* decision, the Court upheld Pennsylvania's abortion waiting period and informed consent requirements. In particular, *Casey* upheld a Pennsylvania requirement that a pregnant woman receive specified information about her pregnancy and planned abortion at least twenty-four hours before having an abortion, even though that would require the woman to make "at least two visits to the doctor." 505 U.S. at 886.

According to the joint opinion in *Casey*, "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Id.* at 885. The joint opinion also observed that this decision was based "on the record before us, and in the context of this facial challenge . . . ." *Id.* at 887.

2. In 1995, the Indiana General Assembly enacted its own abortion informed consent requirement in order to ensure sound medical practice and to inform women about and persuade them not to have abortions. Public Law 187-1995 requires that specified medical personnel provide particular information to a pregnant woman, in her presence, at least eighteen hours before she has an abortion. Ind. Code § 16-34-2-1.1. This requirement expressly does not apply "in the case of a medical emergency . . . ." *Id.* The Indiana Supreme Court has interpreted this exception to "excuse[] a woman from the informed consent requirement when there is a significant threat to her life or health, physical and mental." *A Woman's Choice East-Side Women's Clinic v. Newman*, 671 N.E.2d 104, 111 (Ind. 1996).

The information to be given in-person in non-emergency situations consists of (1) the name of the physician performing the abortion; (2) the nature of the proposed procedure or treatment; (3) the risks and alternatives to the procedure and treatment; (4) the probable gestational age of the fetus (including an offer to provide a picture or drawing of a fetus, the dimensions of the fetus, and information concerning the potential survival of an unborn fetus at that stage of development); and (5) the medical risks associated with carrying a fetus to term. Ind. Code § 16-34-2-1.1. The law permits this information to be given to the woman by either the physician who is to perform the abortion or a woman's referring physician, or, as delegated by either of

those, a physician assistant, an advanced practice nurse, or a midwife. *Id.*

3. The requirement that the specified information be given "in the presence of the pregnant woman" is the subject of this case, but notwithstanding *Casey* it has never been permitted to go into effect. Before the law's effective date, the district court issued a temporary restraining order against enforcement of Public Law 187 in its entirety for ten days. Pet. App. A-158. The parties agreed to extend that temporary injunction pending the district court's resolution of Petitioners' motion for a preliminary injunction. Pet. App. A-159. Following a hearing, the district court entered a preliminary injunction against enforcement of Public Law 187 on November 9, 1995. Pet. App. A-155, A-236.

Because portions of the district court's preliminary injunction turned on the court's admittedly "provisional" (Pet. App. A-216-17, A-231) interpretation that the law's emergency medical exception was too narrow in light of *Casey*, the court certified to the Indiana Supreme Court the question of the proper interpretation of that part of the statute. Pet. App. A-231. As mentioned above, the Indiana Supreme Court then ruled that the exception applied "when there is a significant threat to [a woman's] life or health, physical and mental." *A Woman's Choice-East Side Clinic*, 671 N.E.2d at 111. This interpretation resolved in favor of the statute any questions as to the adequacy of the emergency medical exception. Pet. App. A-142-44. The District Court therefore modified its preliminary injunction such that the only provision of Public Law 187 that remained enjoined was the "in the presence" requirement. Pet. App. A-152. This meant that the required information could be given to prospective abortion patients over the telephone or through the mail, though it still had to be given at least eighteen hours before the abortion. *Id.*

4. The district court held a trial in November 1999 where it took evidence concerning, among other things, the impact of similar laws in Mississippi and Utah. Pet. App. A-84-112. On March 30, 2001, the district court made permanent and final its injunction against the "in the presence" requirement, relying principally on expert studies and testimony submitted by the Petitioners showing that, when in-person counseling laws were implemented in Mississippi and Utah, abortion rates in those states declined by about ten to thirteen percent. Pet. App. A-63; A-65; A-87; A-108; A-112; A-125. The district court also found increases in the number of Mississippi women who traveled out-of-state for abortions and in second-trimester abortions in Mississippi once the Mississippi law was implemented. Pet. App. A-85. It ruled that, because the state had come forward with no proof as to the persuasive impact of in-person counseling laws, the declines in abortion rates found in Mississippi and Utah were *a fortiori* the result of an undue burden and Petitioners did not need to "show definitively the precise mechanism by which . . . an undue burden would result from the law." Pet. App. A-111.

5. In a majority opinion authored by Judge Easterbrook and joined by Judge Coffey, the Seventh Circuit reversed and upheld Indiana's in-person counseling requirement. In summary, the court ruled that the studies from Mississippi and Utah were legally insignificant because they did not speak to the impact an in-person counseling law would have in Indiana. Indiana's law, the court held, must be judged against its actual impact in Indiana, not against a hypothetical impact derived from the experiences of two other states: "it is not possible to predict failure before the whole statute goes into force." Pet. App. A-16. In particular, the Mississippi and Utah studies did not account for factors such as "urbanization, income, average distance to an abortion clinic, average price of an abortion, and so on" that could yield different results in Indiana. Pet. App. A-11. And

whereas the district court taxed the state for failing to prove the persuasive impact of the law (Pet. App. A-113-116), the Seventh Circuit held that, because the preliminary injunction against the in-person law prevented any study of its effects in Indiana, a silent record on the issue of persuasive impact further undermined the legal significance of the Mississippi and Utah data. Pet. App. A-13. The court also ruled that Petitioners' proof was legally insufficient because it did not show that any decline in Mississippi and Utah abortions owing to the in-person requirement resulted from an impermissible substantial obstacle similar to that imposed by spousal notification, rather than merely from permissible marginal increases in the costs of obtaining abortions (or persuasive impact). Pet. App. A-16.

Judge Coffey alone authored a separate concurrence, and Judge Wood dissented. Pet. App. A-18; A-39.

REASONS FOR DENYING THE PETITION

There is no conflict among the circuits or other lower courts and no conflict with *Casey* to justify review. Petitioners' argument that the Seventh Circuit contravened *Casey* by declaring a ten percent decline in abortions not to be a "significant number" fails because only Judge Coffey's concurrence adopted that view. Further, it is implausible to posit a square conflict with *Casey* over the permissibility of pre-enforcement challenges to in-person counseling requirements because *Casey* upheld a similar Pennsylvania law. And nothing in *Casey* (or *Stenberg v. Carhart*, 530 U.S. 914 (2000), for that matter) mandates that a statistical study from one or two states can decide the fate of an abortion law in another state before that law even goes into effect. Review is unwarranted because there is nothing more here than a complaint of erroneous factual findings or a misapplication of a properly stated rule from *Casey*. *See* Rule 10, Rules of the Supreme Court of the United States.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION FROM OTHER CIRCUITS OR OTHER LOWER COURTS

There is no conflict between the decision below and a decision from another Circuit or a lower court. In fact, the Seventh Circuit's decision instead brings this case into line with every other case that has actually considered an in-person informed consent requirement under the undue burden standard since this Court explicitly upheld a similar requirement in *Planned Parenthood v. Casey*, 505 U.S. 833, 886-87 (1992).

In addition to *Casey*, courts have also upheld in-person (or two-trip) requirements enacted by Wisconsin, Mississippi, Kentucky and Utah. *See Karlin v. Foust*, 188 F.3d 446, 488 (7th Cir. 1999) (upholding Wisconsin's twenty-four hour waiting period, assuming a two-trip requirement); *Barnes v. Moore*, 970 F.2d 12, 13-15 (5th Cir. 1992) (upholding Mississippi's twenty-four hour waiting period requirement thought to require two trips to an abortion provider);* *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 453-54 (W.D. Ky. 2000) (upholding Kentucky's twenty-four hour waiting period, assuming a two-trip requirement); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1490-91, 1494 (D. Utah 1994) (upholding Utah's twenty-four hour waiting period that required two trips to an abortion clinic), *rev'd on other grounds*, 75 F.3d 564 (10th Cir. 1995).

In-person requirements have also been enacted by Florida, Louisiana and Ohio. *See* Fla. Stat. ch. 390.0111 (2002); La.

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* Since the decision in *Barnes*, the Mississippi Attorney General has opined that Mississippi's law does not actually require in-person counseling. 95 Op. Miss. Att'y Gen. 0318 (1995), *available at* 1995 WL 328978.

Rev. Stat. Ann. § 40:1299.35.6 (2002); Ohio Rev. Code Ann. § 2317.56 (2002). Ohio's law has been temporarily enjoined by agreement of the parties, but not based on any evaluation by a court. *Cincinnati Women's Servs. v. Voinovich*, C-1-98-289 (S.D. Ohio April 29, 1998). Florida's law has been enjoined by a court, but that injunction is based solely on state constitutional requirements that embody the now-federally-discarded trimester framework articulated in *Roe v. Wade*, 410 U.S. 113, 162-66 (1973), and is expressly *not* based on the *Casey* standard. *State v. Presidential Women's Center*, 707 So. 2d 1145, 1147-49 (Fla. Dist. Ct. App. 1998).

Thus, no court (aside from the district court in this case) faced with actual litigation of an in-person counseling requirement and applying the *Casey* undue burden standard has enjoined such a requirement.

II. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH *CASEY*

This case presents neither an inconsistency with *Casey* nor a new important question of federal law. *Casey* determined that in-person informed consent requirements are presumptively constitutional, and the decision below simply held that, in the absence of any evidence that Indiana's in-person law is actually having an unconstitutional effect, that requirement remains permissible. There is simply no important question of federal law calling for resolution.

A. Only One Judge Opined That Ten Percent Is Not A "Significant Number"

Petitioners' first argument is that certiorari is warranted because the Seventh Circuit somehow held that, even if an in-person requirement causes a ten to thirteen percent decline in abortions, such a decline does not represent a "significant number" of abortions. Pet. 20. As Petitioners themselves

concede (*id.*), the only such statement comes from Judge Coffey's concurrence, not from Judge Easterbrook's majority opinion. *See* Pet. App. A-39. Thus, aside from whether such a holding would conflict with *Casey* (and it would not), it is astonishing that Petitioners make this argument at all. And the fact that this is Petitioners' first argument for granting certiorari underscores the overall weakness of the Petition.

In short, Petitioners are simply incorrect in asserting that Judge Coffey's concurring opinion actually supplies a holding upon which the district court was reversed. Judge Coffey clearly states that he is "pleased to join [Judge Easterbrook's] opinion" (Pet. App. A-39), but Judge Easterbrook nowhere asserts that he joins Judge Coffey's opinion. Thus, Judge Easterbrook's opinion is the majority opinion, and it says nothing about what constitutes a "significant number" or a "large fraction" under *Casey*.

The "narrowest grounds" rule relied upon by Petitioners applies only when "a fragmented Court decides a case and no single rationale explaining the result enjoys . . . [majority] assent . . . ." *Marks v. United States*, 430 U.S. 188, 193 (1977). That rule does not apply here because Judge Easterbrook's opinion—and all of its rationales—enjoys majority assent. Judge Coffey's concurrence does not. Petitioners essentially argue that Judge Coffey has converted his concurring view into a majority holding simply by suggesting that Judge Easterbrook agrees with him, without any formal assent from Judge Easterbrook himself. For obvious reasons, that is not the way our judicial system works.

B. The Seventh Circuit Properly Applied *Casey* To Foreclose A Pre-enforcement Challenge Based On Statistics From Other States

Petitioners assert that the decision below conflicts with *Casey* because it (1) rejects a pre-enforcement challenge to the Indiana law based solely on evidence from Mississippi and Utah, and (2) somehow converts *Casey*'s "undue burden" standard into a standard "at least as deferential as rational-basis review" (Pet. 26-27) by a sleight of hand involving the level of deference given to the district court's findings. Neither contention either justifies the Court's intervention or ultimately has any merit.

1. The decision below ruled that, for a pre-enforcement challenge to Indiana's in-person counseling requirement to succeed, there must be some reliable means of applying the Mississippi and Utah study results to Indiana. Pet. App. A-10-12. Because Petitioners bore the burden of proof yet made no such showing, a successful challenge could come only *after* a period of enforcement that generates data about the actual Indiana experience. *Id.* Such a common-sense conclusion is proper because, while *Casey* permits challenges to in-person counseling laws, it in no way says that such laws are subject to challenge *before* they go into effect based on abortion rate data from two other states.

Petitioners' fundamental mistake is their implicit equating of "facial challenge" with "pre-enforcement challenge." *Casey* at some level permits facial challenges to those abortion laws it upheld, but that is not the same as permitting pre-enforcement challenges to those laws. *Casey* itself speaks of deciding a facial challenge based on a "record" related to enforcement. *Planned Parenthood v. Casey*, 505 U.S. 833, 887 (1992). And Justice Souter (one of the authors of the controlling joint opinion in *Casey*) has rejected the idea that a facial challenge to an informed-consent

requirement could succeed without proof of the law's actual effects. *Planned Parenthood v. Casey*, 510 U.S. 1309, 1311 n.3 (1994) (Souter, J., denying petition for stay of mandate). Indeed, the Third Circuit characterized such future challenges as being "as applied" challenges, and Justice Souter agreed. *Id.* (citing *Planned Parenthood v. Casey*, 14 F.3d 848, 862 n.18 & 863 n.21 (3d Cir. 1994)); *see also Karlin v. Foust*, 188 F.3d 446, 484 (7th Cir. 1999) (relying on the concurrence of Justice O'Connor in the denial of stay in *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993), for the proposition that later challenges to abortion laws upheld in *Casey* must be based on an "individualized factual inquiry" concerning the impact of the law).

In fact, challenges of the sort contemplated by *Casey*—because they seek broad-based relief yet require a showing of a law's actual effects—might more accurately be described as "operational" rather than as either "facial" or "as-applied." *See, e.g.*, Laurence H. Tribe, *American Constitutional Law* § 3-31, at 609-616 (3d ed. 2000). Whatever the proper term, it would apply as much to a challenge based on the law's effects in Indiana as it would to a challenge based on effects in some other state: A post-enforcement challenge of Indiana's abortion law is no less "facial" than a pre-enforcement challenge predicated on post-enforcement statistics from some other state. No one is suggesting that the law may be challenged only in case-by-case challenges of individual women who claim the law imposes an undue burden on them specifically but not necessarily on anyone else. *Cf. Schall v. Martin*, 467 U.S. 253, 273-74 (1984) (holding that a juvenile pretrial detention law was "not invalid 'on its face' by reason of the ambiguous statistics and case histories relied upon by the court below," but that "in some circumstances detention of a juvenile would not pass constitutional muster").

The only question is whether and under what circumstances Petitioners could succeed based solely on proving a law's effects in two other states, or whether their challenge requires them to prove the law's effects *in Indiana*. On this point, the Court reached the reasonable conclusion that, before a sovereign state's in-person counseling abortion regulation may be enjoined as imposing an undue burden, it is necessary for the law's challengers to provide evidence about the impact of the law *in that state*. Pet. App. A-17.

Petitioners' cases concerning pre-enforcement challenges to other types of abortion regulations are not to the contrary, and in fact are helpful in explaining why the decision below was correct in precluding this pre-enforcement challenge. Both *Planned Parenthood v. Lawall*, 180 F.3d 1022 (9th Cir. 1999), and *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997), invalidated parental notification requirements that did not provide for judicial bypass procedures that would sufficiently protect minors' rights according to the standards of *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (plurality opinion). Pre-enforcement challenges were appropriate in *Lawall* and *Ieyoub* because the laws could be tested solely by comparing their texts with what *Bellotti* required and without reference to the laws' actual impacts on abortion rates.

The same is true with respect to the partial-birth abortion ban invalidated in *Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999), which facially proscribed procedures used for constitutionally protected abortions, and with respect to Utah's post-twenty-week abortion ban invalidated in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), which prohibited abortions beyond twenty weeks even where the fetus was not yet viable. Each of these cases presented a classic facial challenge where the texts of the laws themselves provided enough for invalidation, and examination of the actual impact of the

laws on abortion rates was unnecessary. It is true that *Jegley* relied on evidence that doctors sometimes use abortion procedures for pre-viability abortions that the Arkansas partial-birth law, on its face, prohibited. *See Jegley*, 192 F.3d at 796-97; *see also Stenberg v. Carhart*, 530 U.S. 914, 924, 928, 932 (2000) (relying on evidence that the D&E procedure is used in pre-viability abortions and that the D&X procedure is sometimes used when necessary to protect women's health). But such evidence by its nature was both available before the partial-birth laws were enforced and sufficient for facial invalidation of the laws at stake in *Jegley* and *Stenberg* Unlike the situation with an in-person counseling law, there was no need to evaluate the actual impact of the law on abortion rates in the states where the laws were in effect. Similarly, while *Jane L.* mentioned evidence that some Utah women had sought abortions beyond the twenty-week mark (102 F.3d at 1117), such evidence merely substantiated the plaintiffs' claims that some women actually would seek pre-viability, post-twenty-week abortions that were banned by the law's facial prohibitions; that is a far different inquiry than whether an otherwise facially valid in-person counseling law would nonetheless have an unconstitutional impact as proven (in part) by the impact on abortion rates. And in any event, the *Jane L.* evidence reflected the experience in Utah itself rather than some other state.

By contrast, without empirical proof of the law's effect on abortion rates, an in-person counseling requirement is perfectly valid under *Casey*. *Casey* started from the position that, "[i]n theory, at least, the waiting period [which included a two-trip requirement] is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden." 505 U.S. at 885. This means that, for a future challenge to an in-person requirement to succeed, the challengers must provide *some* proof of the law's impact,

which in turn means the law must go into force. Moreover, Petitioners' litigation strategy essentially acknowledges as much: They sought to win by proving a drag on abortions following implementation of a similar law in Mississippi, not by relying on the text of the law itself.

This case cannot, therefore, be analogized to abortion laws that were invalidated without evidence of empirical effects. Some operational proof is required, and absent proof that Indiana abortion trends will necessarily follow Mississippi and Utah trends, such an operational challenge may succeed only with evidence of the law's effects in Indiana. Nothing in *Casey* or *Stenberg* precludes such a sensible result.

2. Petitioners complain that the decision below reversed based on disagreements with the district court concerning the significance of the Mississippi and Utah studies, thereby resulting in a standard of review improperly deferential to the statute. Pet. 21-27. *Casey*'s undue burden standard, however, does not turn district courts into infallible judges of what constitutes legally sufficient proof, and a court of appeals' reversal of a district court's erroneous legal conclusion concerning the sufficiency of proof does not convert the undue burden standard into rational basis. In any event, this issue is far too convoluted to justify review.

As in all cases, Rule 52(a) of the Federal Rules of Civil Procedure and *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985), permit district courts' findings of historical fact to be reversed in abortion cases only where such findings are clearly erroneous. But the Seventh Circuit did not reverse based on disagreements concerning historical facts. *See* Pet. App. A-10 (leaving intact findings of historical fact in light of Rule 52(a) and *Anderson*). It instead reversed the district court's erroneous legal conclusion that pre-enforcement evidence from other states is sufficient to prove that Indiana's law will cause an undue burden.

In a variety of contexts, the Court has held that a district court's judgment regarding the constitutional significance of its factual findings should be reviewed *de novo*. *See, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (holding that a district court's determination of the constitutionality of punitive damages is reviewed *de novo*); *Ornelas v. United States*, 517 U.S. 690 (1996) (holding that a district court's ultimate finding of probable cause to support a search or seizure is a mixed question of law and fact that is reviewed *de novo* even though the district court's findings of historical fact are given deference). *Casey* itself accepted the district court's findings regarding the burdens imposed by a mandatory waiting period, but disagreed with the district court's determination of the constitutional significance of those facts. 505 U.S. at 885-87. Thus, the Seventh Circuit was well within its power to reverse the district court based on its disagreement concerning the legal significance of historical facts.

Further, Petitioners' criticism that the decision below replaces the district court's factual inferences concerning the Mississippi and Utah experiences with the Seventh Circuit's own inferences is unwarranted. The Seventh Circuit's plausible suggestions as to what might happen in Indiana merely explain why, as a legal matter, the results in Mississippi and Utah were insufficient. More fundamentally, under *Casey* it is entirely permissible for the Seventh Circuit to require proof that what happened in Mississippi and Utah is *bound to be* what will happen in Indiana in order for results in those two states to be significant. *Casey* does not say that all in-person laws can be invalidated if just one or two states experience declines in abortions as a result of such a requirement. At most, *Casey* permits state-by-state evaluations based on local experiences. Here, Petitioners were hoping to provide such an evaluation of the Indiana law by using Mississippi and Utah as proxies for Indiana. It

stands to reason that without evidence justifying such proof-by-proxy, such a method of proof must fail.

As with the parental notification, partial-birth, and post-twenty-week laws discussed above, *Casey*'s invalidation of spousal notification laws does not compare to in-person counseling. The *nature* of spousal notification, not empirical proof, makes that requirement *likely* to impose a substantial obstacle. *Casey*, 505 U.S. at 887-94. This is not true with in-person counseling requirements, which can be invalidated only with, among other things, empirical proof. *Id.* at 885.

What remains is not a proof scheme that somehow permits invalidation of in-person requirements based on assumptions about the common behaviors of women (or anybody else), but a scheme that permits invalidation only if, according to empirical measures, the law combines with state (or region)-specific factors to impose an impermissible substantial obstacle to abortion. *See* Pet. App. A-11; *see also Karlin*, 188 F.3d at 485-86 (suggesting that a two-trip requirement might impose an undue burden if factors such as the number of physicians and clinics available, the distances to clinics, and the income of women seeking abortions make it a substantial obstacle to abortion). As such, without conclusive proof that abortion availability and other relevant conditions are the same for women in Indiana as for women in Mississippi and Utah, it does not suffice merely to say that the impact of an in-person law in Indiana will likely be the same as in Mississippi and Utah. *See* Pet. App. A-12.

Nothing about this reasonable implementation of *Casey* equates with rational basis review. The Seventh Circuit's holding that Indiana's law should be judged by its impact in Indiana does not require Petitioners to negate every conceivable rational justification for the law. Indeed, the Seventh Circuit's standard permits invalidation of an in-person counseling law *notwithstanding* permissible rational

justifications for the law if there is proof that the law also actually imposes a substantial obstacle for a large fraction of women seeking abortions. Undue burden remains the standard; the decision below at most precludes proof of undue burden from two other states where abortion availability and other relevant factors are not necessarily the same.

C. The Seventh Circuit Properly Held That *Casey* Requires A Showing Of *How* In-Person Counseling Imposes A "Substantial Obstacle"

Entirely apart from the proper level of deference owed to the district court on the applicability of the Mississippi study to Indiana, the decision below correctly identified an independent ground for reversing the district court that Petitioners have not directly challenged: their failure to carry their burden to prove the mechanism by which any decline in Mississippi abortions occurred. *Casey* imposes this requirement because, if in-person requirements merely persuade women not to have abortions or merely impose higher marginal costs on abortions that do not amount to a substantial obstacle in some functional sense, such laws are perfectly valid. *Planned Parenthood v. Casey*, 505 U.S. 833, 886-87 (1992); *see also Karlin v. Foust*, 188 F.3d 446, 487 (7th Cir. 1999) (holding that it is not enough simply to show that the number of abortions declined; a plaintiff "must also explain *why* the law had this effect") (emphasis added); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 457 (W.D. Ky. 2000) (ruling that evidence that abortions declined did not answer the essential question of why that decline occurred).

The district court reached two erroneous legal conclusions concerning the means by which an in-person requirement might cause a decline in abortions. First, the district court rejected the possibility that the requirement could have had a persuasive effect on women in Mississippi and Utah merely because evidence concerning the impact of giving the

required information over the telephone showed no persuasive effect, because more women traveled out of state to have abortions, and because the *state* had not proven persuasive effect (which was not the state's burden in any event). Pet. App. A-113-115. Second, the district court ruled that Petitioners "do not need to show definitively the precise mechanism by which . . . an undue burden would result from the law." Pet. App. A-111.

The Seventh Circuit corrected these erroneous legal conclusions in two ways. First, the court reached the common-sense conclusion that information delivered in person could be more persuasive than information delivered over the telephone or through the mail, such that the persuasive impact of an in-person law could not be foreclosed as a cause for any decline that might occur in Indiana or elsewhere. Pet. App. A-13. This holding also carried the implicit—and correct—conclusion that it was not the state's burden to prove persuasive impact.

Second, the Seventh Circuit ruled that, indeed, Petitioners *were* required under *Casey* to show the mechanism for any perceived decline in Mississippi and Utah abortions, and that they had failed to provide that proof. The court observed that those declines might be caused either by a substantially greater likelihood that an abusive spouse, parent, or partner would intercede (an impermissible cause), or merely by adding a modest cost that tips the scales against abortion for women who are uncertain about whether to have the procedure (a permissible, because not substantial, cause). Pet. App. A-13-14. However, the court concluded, "[t]his record does not permit (and the district judge did not make) an inference either way about the reason for the decline in Mississippi and Utah." *Id.* at A-14. Continuing, the court explained as follows:

> The record in this case does not show that a two-visit rule operates similarly to a spousal-notification rule by facilitating domestic violence or even inviting domestic intimidation. It shows nothing except a decline in the number of abortions in Mississippi and Utah—leaving open both the extent to which other states would experience the same effect and the reason *why* the effect occurs.

Pet. App. A-16. Thus, it is not enough for the law to have no persuasive effect (which Petitioners have not proved in any event); a successful challenge to an in-person counseling law must also show the means by which the law imposes a substantial obstacle to abortion, a point on which the district court erred. *See* Pet. App. A-111. This is true even on Petitioners' terms because of the other permissible purposes of the law: to inform women about abortion and to ensure sound medical practice.

As *Casey* itself recognized, this remaining question—does the in-person requirement cause a decline in abortions through some constitutionally unacceptable means?—fundamentally distinguishes in-person counseling requirements from other abortion regulations in terms of permitting pre-enforcement challenges. As discussed in Part II.B., *supra*, spousal notification, parental notification, and even partial-birth abortion regulations all could be challenged before enforcement because the means by which they affect abortions is so obvious. There is no such facially transparent logic with respect to in-person counseling requirements.

Furthermore, *Casey* expressly held that the fact that an informed consent requirement requires two trips to a clinic and thereby imposes marginally higher costs on women who wish to obtain abortions does not constitute a "substantial obstacle." 505 U.S. at 886. To the extent that *Casey* left open the possibility that such marginal costs could

functionally constitute "substantial obstacles" if a district court makes the proper findings, the district court here made no such findings (as the Seventh Circuit observed). Indeed, on this score the record here is actually less favorable to Petitioners than the record in *Casey*. The *Casey* district court found that the two-trip requirement would be "particularly burdensome" on those who "have the fewest financial resources [and] those who must travel long distances." *Id.*at 886. But here the district court found that the Mississippi study showed no correlation between any decline in abortions and the economic status of women obtaining abortions (as measured by race) or the distance women lived from abortion clinics. Pet. App. A-111.

According to the express holdings of *Casey*, this is a critical missing piece of evidence. *See also Karlin v. Foust*, 975 F. Supp. 1177, 1217 (W.D. Wis. 1997) ("Without this expected correlation, one can only speculate that the additional trip is an insurmountable obstacle, rather than merely a less desirable option."), *aff'd*, 188 F.3d 446 (7th Cir. 1999). That the district court simply breezed past this gap in the evidence itself justified reversal by the Seventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 02-935

IN THE

Supreme Court of the United States

A WOMEN'S CHOICE-EAST SIDE WOMEN'S CLINIC, A CLINIC FOR WOMEN, INC., PLANNED PARENTHOOD OF CENTRAL AND SOUTHERN INDIANA, INC., INDIANAPOLIS WOMEN'S FACILITY, FORT WAYNE WOMEN'S HEALTH ORGANIZATION, INC., ULRICH G. KLOPFER, D.O., WOMEN'S PAVILION, INC., and FRIENDSHIP FAMILY PLANNING CLINIC OF INDIANA, on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

CARL J. BRIZZI, in his official capacity as a Prosecuting Attorney for Marion County, and GREGORY WILSON, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners respectfully submit this reply brief in support of their petition for certiorari.

ARGUMENT

Respondents ["the State"], echoing the erroneous decision of the court below, argue very candidly that the only possible way in which Indiana's in-person information requirement for women seeking abortions could be held unconstitutional would be if evidence established that the requirement, *when implemented in Indiana*, imposes an undue burden. *See, e.g.*, Respondents' Brief in Opposition ["Opp. Cert."] at 1 (statute "must be judged by its actual effects in Indiana, not by a similar law's impact in another state."); *id.* at 7 (statute is permissible "in the absence of any evidence that Indiana's in-person law is actually having an unconstitutional effect"). But neither *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), nor any other decision in this Court's abortion jurisprudence, prohibits district courts from inferring the likely effects of a statutory requirement from evidence of the effects of similar laws in other states.[1] Indeed, neither the court below nor the State muster a single citation to a case so holding. On the contrary, the best

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[1] In *Casey* itself, this Court had before it no evidence of the *actual* impact of a husband notice requirement for abortion in *any* state, let alone Pennsylvania, since *Casey* involved a pre-enforcement challenge. *See* 505 U.S. at 845. Instead, based on expert evidence about women in abusive relationship and studies about family violence, *see* 505 U.S. at 888-93, this Court held that the requirement was "likely" to impose an undue burden. *Id.* at 893. In fact, this Court specifically noted that the "limited research that has been conducted with respect to notifying one's husband about an abortion" was "too small to be representative." 505 U.S. at 892. Thus, if anything, the evidence here is *more* direct than the evidence available to this Court in *Casey* regarding Pennsylvania's statute, because it is evidence of the actual effects of similar statutes. The holding of the court below that such evidence cannot prove undue burden is irreconcilable with *Casey*'s reliance upon less direct proof of undue burden.

possible evidence of a statute's likely effects is evidence of the effects of similar statutes in other states. The holding of the court below would bar pre-enforcement challenges to any abortion restrictions other than those specifically held unconstitutional by this Court; it is out of step with the entire tenor of the undue burden standard established by *Casey*.

I. Lack of Persuasive Effect.

At trial, the parties' experts agreed with the common-sense statement that a comparison of effects of a requirement of in-person delivery of information with the effects of a statute permitting telephone delivery of similar information would be one way of isolating whether the information was persuasive or whether, instead, observed decreases in numbers of abortions were the result of the burdens of the law. Tr. at 41 (Henshaw); Tr. at 180-82 (Uhlenberg) (agreeing on cross examination that lack of change in percentage of women keeping appointments for abortions before and after statutory information was supplied would be evidence of lack of persuasive effect).

A. Effects Without Requiring Additional Visit.

Here, the record establishes that in Indiana itself, the state-mandated information, divorced from the requirement that the information be delivered in person, has had absolutely *no* persuasive effect. Thus, Delbert Culp, the President of Planned Parenthood of Central and Southern Indiana, testified that after the mandatory information began to be provided orally to Planned Parenthood's patients seeking abortions, the percentage of women who kept their appointments for abortions *increased*, despite the fact that Planned Parenthood's fees for abortion services were increased to "accommodate the law." Tr. at 12 (Culp) ("Our no show rate is going down.").[2] *See also* A-115 (district

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[2] Citations to the trial transcript are in the form "Tr. at __ (name of witness)"; citations to the transcript of the preliminary injunction hearing

court finding). Similarly, Susan Derwin, assistant administrator of Petitioner Clinic for Women, testified that the percentage of women keeping appointments remained stable after the information began to be provided orally to abortion patients, also despite an increase in price for abortions. Tr. at 216 (Derwin).[3] Moreover, in North Dakota, where similar information was also provided by telephone, no change was observed in the number of abortions performed by the sole abortion provider in that state. A-195-96. *See also* A-113 (district court quotes counsel for the State as acknowledging that the only persuasive effect of Indiana's information was to persuade women to have more abortions).[4] In addition, some of the changes observed in Mississippi could not be explained by persuasive effect. *See* A-115 (explaining how changes in interstate travel for abortions in Mississippi "tends to show the absence of a persuasive effect").

B. Effects When Additional Visit Is Required.

In contrast, in Mississippi, where information similar to that required in Indiana and North Dakota was provided in

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are in the form "P.I. Tr. at __ (name of witness)"; citations to the Petition are in the form "Pet. __"; citations to the Appendix to the Petition are in the form "A-__."

[3] The State perpetuates the red herring of the court below in asserting that the preliminary injunction entered by the district court permitted the statutory information to be provided "through the mail," Opp. Cert. at 3, *see also* A-13 (opining that "information delivered orally . . . 'takes' better than information delivered exclusively in writing."). But here the district court only enjoined the statute's requirement that the information must be delivered "in the presence" of the woman, leaving in force the statute's requirement that the information must be delivered "orally." A-239.

[4] The State repeatedly makes the bizarre assertion that the decision of the court below is supported by "a silent record on the issue of persuasive impact" of Indiana's law. Opp. Cert. at 5. Far from being "silent" on the issue, the record speaks with a loud and clear voice: Indiana's law has *no* persuasive effect.

person, necessitating that women make an additional visit to the abortion provider, the evidence established that women were *prevented* from obtaining abortions: the abortion rate decreased, the proportion of second-trimester abortions increased, the proportion of women leaving the state for abortions increased, and the proportion of out-of-state women entering the state for abortions decreased. *See, e.g.*, A-109 (summary of findings regarding Mississippi); A-187 (chart summarizing one analysis of effects in Mississippi). In Utah, which also required an in-person visit, similar effects were observed. A-106-07 (summarizing effects observed in Utah).

The district court's conclusion that Indiana's in-person requirement will prevent women from having abortions, and not decrease the number of abortions through (permissible) persuasive effects is an eminently reasonable inference from the facts. It is not, as the State seeks to portray it, an assessment of the "legal significance of historical facts." Opp. Cert. at 14.[5] Under this Court's holding in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the in-person requirement is unconstitutional because it imposes an undue burden on the abortion right: it prevents many abortions through burdens it imposes, and serves no legitimate interest whatsoever.[6]

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[5] The only holding by the court below that amounts to an assessment of the legal significance of historical facts is the holding expressed in the concurrence of Judge Coffey: that preventing 10% to 13% of women from obtaining abortions does not amount to an undue burden. As explained in the Petition, Pet. at 20, this holding is in conflict with *Casey* and, at the very least, decides an important question of federal law that should be decided by this Court.

[6] The State asserts that even if Indiana's in-person requirement has no persuasive effect, it nevertheless serves the purposes of "inform[ing] women about abortion and . . . ensur[ing] sound medical practice." Opp. Cert. at 18. There is no evidence in the record, and the State cites none, showing that these same purposes are not achieved by the statute minus the in-person requirement, or that these purposes are not already

Faced with this evidence that requiring an additional visit prevents women from having abortions, the State now makes two arguments to justify the decision of the court below. First, the State claims that "there must be some reliable means of applying the Mississippi and Utah study results to Indiana." Opp. Cert. at 9. Second, the State asserts that Petitioners had the burden of explaining *how* Indiana's in-person informational requirement imposes a substantial obstacle, but failed to do so. Both claims are refuted by the record.

II. Mississippi and Utah Effects Apply to Indiana.

The State repeatedly asserts that the record contains no evidence justifying the district court's "evaluation of the Indiana law by using Mississippi and Utah as proxies for Indiana." Opp. Cert. at 14. But the record does contain such evidence. Specifically, Petitioners' expert Dr. Henshaw testified as follows:

> **Q** Do you think the results of your Mississippi studies are generalizable to other states? In other words, they could be used to predict what could occur in other states if similar laws were implemented?
>
> **A** I would think that they would apply to any state in the United States. The culture is similar. The amount charged for abortion, the circumstances under which abortions are obtained, the attitudes toward abortion, are fairly uniform throughout the country.
>
> I'm not saying there's no differences. There are differences. *No two states would be*

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accomplished by the malpractice liability physicians face for failure to engage in sound medical practice or failure to obtain informed consent.

> *exactly affected to the same degree, but the direction of the affect [sic] and the general fact there would be an affect [sic] would be similar anywhere in the country.*

Tr. at 35 (Henshaw) (emphasis added). In other words, Dr. Henshaw, the only expert in the sociology of abortion who testified at trial, testified that a decrease in abortions would be observed in any state that implemented a law like Mississippi's -- though the size of the effect might differ. No testimony controverting this opinion was introduced by the State. Moreover, the very fact that similar effects (decreases) were observed in states as geographically distinct as Mississippi and Utah supports, as a common-sense matter, the conclusion that a similar effect (i.e., a decrease in abortions) would be observed in Indiana.[7]

III. Petitioners Have Explained How The In-Person Requirement Will Prevent Abortions.

The State provides no support for its contention that, even if it is shown that Indiana's in-person requirement will prevent many abortions, Petitioners must also explain "how" it will do so. Under *Casey*, it suffices to show *that* a restriction imposes a substantial obstacle; the exact mechanism need not be demonstrated. In any event, the record contains evidence of how abortions will be prevented. For example, women seeking abortions in Indiana often

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[7] At one point, the State goes so far as to say that inferences about the likely effects of Indiana's law cannot be made absent "*conclusive proof* that abortion availability and other relevant conditions are *the same* for women in Indiana as for women in Mississippi and Utah." Opp. Cert. at 15 (emphasis added). This is simply wrong. Conditions need not be the same; they need only be sufficiently similar so that the direction of the effect will be the same in all three states. Dr. Henshaw's testimony that the direction of the effect (preventing abortions) will be the same suffices to support the inference made by the district court, and certainly suffices to survive under the clearly erroneous standard.

express concerns about arranging transportation to the abortion provider, *see* Tr. at 220 (Derwin), Tr. at 223 (Derwin) ("It's sometimes hard to find someone who they can trust, who they can ask to give them a ride."); about arranging their work and day care schedules in order to keep an appointment; and about where to stay overnight if they are traveling a long distance. Tr. at 220-21, 223 (Derwin). Many women have difficulty paying for abortions. Tr. at 221-22, 224 (Derwin). Further, if a woman is past her first trimester of pregnancy, she must obtain the abortion at Wishard Hospital in Indianapolis, the only second-trimester abortion provider in the state. Tr. at 27 (Culp). Some women are forced to do so by the difficulty of making transportation arrangements. Tr. at 224 (Derwin) ("I know there have been women who have cancelled appointments because they did not have transportation and it got to where they were too far along."). Many women express concerns about preserving the confidentiality of the abortion. Tr. at 223 (Derwin). Some live in abusive relationships and are afraid they will "be beaten or worse" if the abusive partner finds out they are pregnant and planning an abortion. Tr. at 224 (Derwin). Abortion providers and their patients are subjected to harassment by anti-choice protesters, and protesters' opportunity to harass patients and breach their confidentiality is enhanced by requiring women to make an additional visit to the provider. P.I. Tr. at 256-57 (Greening).

All these concerns -- expressed by women even in the absence of an additional in-person informational visit -- explain "how" the in-person requirement will prevent women from having abortions. They are similar to the facts described by the joint opinion in *Casey* as "troubling." 505 U.S. at 886. Here, however, the record contains the additional evidence, lacking in *Casey*, of what has actually occurred in two states when an additional visit is required, evidence of lack of persuasive effect, and this evidence of the mechanisms by which the requirement produces its effects.

While the district court in *Casey* simply found that these mechanisms would be "particular burdens" on some women, *see* 505 U.S. at 886, that court lacked the evidence present in this record that these particular burdens actually constitute substantial obstacles to many women. As Ms. Derwin testified, "For the women having trouble making one trip, two trips can be nearly impossible to make and still remain within the 12 week time frame." Tr. at 225 (Derwin). Indiana's in-person requirement will impose substantial obstacles for many women seeking abortions in the state, and is therefore unconstitutional.

The decision of the court below transforms the undue burden standard into one that requires women in Indiana to endure the violation of their basic constitutional rights before, perhaps, a district court is permitted to enforce the Constitution. Though *Casey* diminished the standard of review applicable to abortion regulations, it did not go so far as to permit states to implement requirements, such as Indiana's in-person informed consent requirement, that will prevent women from obtaining abortions without even serving any interest. Certiorari should thus be granted to bring the Seventh Circuit into harmony with this Court's precedent and to ensure that pre-enforcement challenges to those abortion restrictions with a clear record of impermissible effects remain possible.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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